

No. 12386

United States
Court of Appeals
For the Ninth Circuit.

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

FEB 2 - 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

CARL E. DAVIDSON ESQ.,

1525 Yeon Building,
Portland, Oregon,

appearing on behalf of the Petitioner.

RALPH R. BAILEY, ESQ.,

723 Pittock Block,
Portland Oregon,

appearing on behalf of the Petitioner.

JOHN H. PIGG, ESQ.,

appearing on behalf of the Commissioner of
Internal Revenue, Respondent.

Docket No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1947

Dec. 24—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 29—Copy of petition served on General Counsel.

1948

Feb. 3—Answer filed by General Counsel.

Feb. 3—Request for hearing in Portland, Oregon filed by General Counsel.

Feb. 6—Notice issued placing proceeding on Portland, Oregon calendar. Service of answer and request made.

Apr. 6—Hearing set 6/1/48 in Portland, Oregon.

June 7—Hearing had before Judge Johnson on
& 8—merits and motion of S. R. Collins to withdraw as counsel—motion granted. Appearance of Carl E. Davidson and Ralph R. Bailey as counsel filed at hearing. Petitioner's brief due 7/23/48. Respondent's brief 9/3/48. Petitioner's reply brief 9/23/48.

June 7—Order allowing withdrawal of counsel of record for petitioner, entered.

July 23—Transcript of hearing 6/7/48 filed.

July 23—Transcript of hearing 6/8/48 filed.

July 28—Agreed motion for extension to 9/1/48 to file brief, filed by taxpayer. 7/28/48 Granted.

Aug. 24—Brief filed by taxpayer. Copy served 8/25/48.

Oct. 8—Motion for extension to Nov. 19, 1948 to file respondent's brief and to Dec. 20, 1948 to file petitioner's reply brief filed by General Counsel. 10/18/48. Granted

Nov. 18—Motion for extension to Nov. 29, 1948 to file brief filed by General Counsel. 11/19/48 Granted.

Dec. 3—Motion for leave to file the attached reply brief, brief lodged filed by General Counsel. 12/6/48 Granted and Served.

Dec. 31—Motion for extension to 2/15/49 to file reply brief filed by taxpayer. Motion granted.

1949

Feb. 11—Reply brief filed by taxpayer. Copy served.

Mar. 23—Memorandum findings of fact and opinion rendered. Judge Johnson, Decision will be entered under Rule 50. Copy served.

Apr. 19—Motion for reconsideration and for review by entire court, filed by taxpayer.

Apr. 19—Memorandum in support of above motion filed by taxpayer.

Apr. 25—Petitioner's motion for reconsideration is denied.

Apr. 26—Order denying motion for full court review, entered.

May 12—Respondent's computation filed.

May 16—Petitioner's computation filed.

May 18—Hearing set June 15, 1949 on settlement.

June 15—Hearing had before Judge Kern on settlement—continued to 6/29/49.

June 15—Order of continuance to 6/29/49 on settlement, entered.

June 29—Hearing had before Judge Johnson on settlement—Held C. A. V. Appearance of John F. Condon, Jr., as counsel filed, and affidavit of Carl E. Davidson.

July 12—Transcript of hearing 6/29/49 filed.

July 18—Decision entered, Judge Johnson, Div. 10.

Aug. 29—Motion to fix bond in the amount of \$13,791.88.

Aug. 30—Order fixing bond in the amount of \$14,000.00 entered.

Sept. 16—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by taxpayer.

Sept. 16—Statement of points and affidavit of service by mail thereon filed by taxpayer.

Sept.16—Designation of record with affidavit of service by mail thereon filed by taxpayer.

Sept.21—Notice of filing petition for review with proof of service thereon filed.

THE TAX COURT OF THE UNITED STATES

Docket No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:90D:DLA), dated October 3, 1947, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation with its principal office at 669 High Street, Eugene, Oregon. The returns for the periods here involved were filed with the Collector for the District of Oregon.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on October 3, 1947.

3. The taxes in controversy are income taxes, declared value excess-profits taxes and excess profits taxes for the calendar years 1942, 1943, and 1944, in the aggregate amount of \$55,638.42, and penal-

ties in the amount of \$8,968.49, or a total of \$64,606.91, the entire amount of which is in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in indicating that conferences were held on March 28, April 9, and May 28, 1947, with respect to the returns of the petitioner, and that any statements were made with respect thereto.

(b) The Commissioner erred in asserting delinquency penalties for the years 1943 and 1944.

(c) The Commissioner erred in indicating that the capital stock of petitioner was owned in equal proportions by John J. Rogers and Louis C. Scharpf, and in disregarding for Federal income tax purposes a partnership known as Twin Oaks Builders Supply Co., and transactions between said partnership and petitioner.

(d) The Commissioner erred in including in the taxable income of the petitioner income of said partnership for the years 1942, 1943, and 1944.

(e) The Commissioner erred in disallowing a net operating loss carry-over from the year 1941.

(f) The Commissioner erred in computing excess profits taxes on the net income of petitioner for the years 1943 and 1944, and in asserting deficiencies in income taxes, declared value excess-profits taxes, and excess profits taxes for the years 1942, 1943, and 1944, in the amounts set out in Exhibit A, or in any other amounts.

5. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

(a) On January 2, 1941, the stockholders of petitioner met at a special meeting duly and legally called, all of the stockholders being present, as follows:

John J. Rogers	472 shares
Eva M. Scharpf	436.7 shares
Louis C. Scharpf	35.3 shares
E. R. Bryson	2 shares
Total	<u>946.0 shares</u>

At this meeting the stockholders voted to discontinue and dispose of the wholesale and retail lumber and building supply business of petitioner and to reduce its activities to those of a holding company, which they were authorized to do under petitioner's Articles of Incorporation, retaining certain real estate, fixtures and equipment which might thereafter be leased; and to change the corporate name of petitioner to Twin Oaks Company, and appropriate resolutions were adopted authorizing the directors to proceed forthwith to carry out the purposes of such resolutions.

(b) At a meeting of the Board of Directors of petitioner on January 2, 1941, following the meeting of the stockholders, the resolutions of the stockholders were acknowledged and made a part of the proceedings of the directors, and in addition an offer made by John J. Rogers, Corabelle M. Rogers, Louis C. Scharpf and Eva M. Scharpf to acquire the operating assets, and assume the liabilities of

petitioner was accepted, and by an appropriate resolution the officers of petitioner were authorized and directed to execute on behalf of petitioner a lease covering the lands, buildings, and fixtures and equipment unto the purchasers for a period of one year.

(c) Petitioner thereupon discontinued the business in which it had theretofore engaged. The purchase price of the operating assets was in due course paid and petitioner has no interest in the business or profits of the partnership known as Twin Oaks Builders Supply Co. which the Commissioner seeks to attribute to the petitioner.

(d) Under date of October 3, 1947, the Commissioner addressed notices of deficiency to John J. Rogers and Louis C. Scharpf wherein, among other things, it is stated that "It has been further determined, therefore, that the incomes of the business conducted under the name of Twin Oaks Builders Supply Co., an alleged partnership, for the years 1942, 1943, and 1944 which were reported in the returns of (wife of taxpayer addressed) are taxable to you."

(e) The Commissioner has thereby determined that Twin Oaks Builders Supply Co. was a bona fide partnership as between John J. Rogers and Louis C. Scharpf, but has disallowed the participation therein of their respective spouses, and has issued notices of deficiency based upon such disallowances of the interest of the respective wives. Under these circumstances it is believed that this same income of Twin Oaks Builders Supply Co.,

by the Commissioner's own admission, cannot be added to the income of this petitioner, as Commissioner has done as will be seen from Exhibit A hereof.

Wherefore, the petitioner prays that this Court may hear the proceeding and determine that there are no deficiencies in Federal income taxes, declared value excess-profits taxes, or excess profits taxes for the years 1942, 1943, and 1944.

/s/ SPENCER R. COLLINS,

Counsel for the Petitioner

AFFIDAVIT

State of Oregon,
County of Lane—ss.

John J. Rogers, being duly sworn, says that he is president of Twin Oaks Company, an Oregon corporation, the petitioner above-named, duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true except those stated to be upon information and belief, and that those he believes to be true.

/s/ JOHN J. ROGERS,

Subscribed and sworn to before me this 18th day of December, 1947.

[Seal] /s/ KATHERINE P. MARTIN,
Notary Public for Oregon

My Commission Expires: 4/8/49.

EXHIBIT A

Treasury Department
Internal Revenue Service
Seattle 1, Washington

October 3, 1947

Office of Internal Revenue Agent in Charge,
Seattle Division, 305 A 1331 Third Avenue
Building.

IT:90D:DLA

Twin Oaks Company
669 High Street
Eugene, Oregon

Gentlemen:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1942, December 31, 1943, and December 31, 1944, discloses a deficiency of \$9,047.67 and that the determination of your declared value excess-profits tax liability for the above-mentioned years discloses a deficiency of \$10,716.79, and that the determination of your excess profits tax liability for the years ended December 31, 1943, and December 31, 1944, discloses a deficiency of \$35,873.96 and \$8,968.49 in penalty, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Colum-

bia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 25, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Seattle 1, Washington for the attention of IT:90D:DLA. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEORGE J. SCHOENEMAN,
Commissioner.

By /s/ S. R. STOCKTON,
Internal Revenue Agent in
Charge.

Enclosures:

Statement

Form 870

DLA:mtr

Twin Oaks Company vs.

Statement

IT :90D :DLA

Twin Oaks Company
669 High Street
Eugene, Oregon

Tax Liability for the Taxable Years Ended
December 31, 1942, 1943 and 1944

	Liability Income Tax	Assessed Tax	Deficiency	Penalty
1942	\$ 1,394.61	None	\$ 1,394.61	
1943	3,305.23	\$184.85	3,120.38	
1944	4,672.53	139.85	4,532.68	
Total	\$ 9,372.37	\$324.70	\$ 9,047.67	

Declared Value Excess-Profits Tax

1942	\$ 373.11	None	\$ 373.11	
1943	3,778.43	None	3,778.43	
1944	6,565.25	None	6,565.25	
Total	\$10,716.79	None	\$10,716.79	

Excess Profits Tax

1943	\$11,311.08	None	\$11,311.08	\$2,827.77
1944	24,562.88	None	24,562.88	6,140.72
Total	\$35,873.96	None	\$35,873.96	\$8,968.49

In making this determination of your income, declared value excess-profits, and excess profits tax liabilities, careful consideration has been given to the statements made at the conferences held on March 28, April 9, and May 28, 1947.

It has been determined that by reason of your failure to file timely excess profits tax returns for the years 1943 and 1944, delinquency penalties are due in the amounts shown by the following tabulation:

1943.....	\$2,827.77
1944.....	6,140.72

A copy of this letter and statement has been mailed to your representative, Spencer R. Collins, Eugene, Oregon, in accordance with the authority contained in the power of attorney executed by you.

Taxable Year Ended December 31, 1942

Adjustments to Net Income

Net income as disclosed by return.....	\$ (248.55)
Unallowable deductions and additional income:	
(a) Other income	\$4,703.66
(b) Capital gain	591.63
(c) Net operating loss deduction	904.83 6,200.12
Net income adjusted	\$5,951.57

Explanation of Adjustments

(a) and (b)

You were organized under the laws of Oregon on or about August 8, 1924, for the purpose, inter alia, of selling lumber and building materials at retail. Your corporation income and declared value excess profits tax returns for the calendar year 1940 shows that your stock, which consisted of 946 shares was owned in equal proportions by John J. Rogers and Louis C. Scharpf. Subsequent to December 31, 1940, and prior to January 25, 1941, your corporate name was changed from Twin Oaks Builders Supply Company to the Twin Oaks Company.

On January 25, 1941, but "as of January 1, 1941," John J. Rogers and his wife, Corabelle M. Rogers, and Louis C. Scharpf and his wife, Eva M. Scharpf, executed a certain written document whereby they purported to associate themselves together as copartners under the name of Twin Oaks Builders Supply Co. for the purpose of selling lumber, building materials, and related lines at retail.

In accordance with the terms of the document executed January 25, 1941, you transferred certain assets theretofore used in the conduct of the business for which you were organized, consisting of cash, trucks, notes and accounts receivable, inventories, and a certain investment, to the Twin Oaks Builders Supply Co., the alleged partnership organized as of January 1, 1941.

On January 2, 1941, your corporation and each of the above-named four individuals executed a certain written document, by the provisions of which you purported to lease to the Twin Oaks Builders Supply Co., the alleged partnership purportedly organized as of January 1, 1941, your real estate, buildings, and furniture and fixtures previously used in the conduct of your business.

It has been determined that the transactions by which (1) a partnership purported to be organized, or formed, under the name of the "Twin Oaks Builders Supply Co.," (2) your corporation purported to transfer certain of its properties to the alleged partnership, and (3) your corporation purported to lease its real estate, buildings, and furniture and fixtures to the alleged partnership, are without substance and are to be disregarded for Federal income tax purposes. Accordingly,

the net incomes derived from the operation of the business conducted under the name of the Twin Oaks Builders Supply Co. for each of the years 1942, 1943 and 1944 has been included in your taxable income for each of said years.

In computing your taxable incomes for the years 1942, 1943 and 1944 deductions for compensation of your officers, John J. Rogers and Louis C. Scharpf, president and secretary-treasurer, respectively, have been allowed in the amount of \$6,600.00 each, a total of \$13,200.00 for each year.

	Ordinary Income	Long-Term Capital Gain
1942		
Reported on Forms 1065 filed by the Twin Oaks Builders Supply Co.	\$17,903.66	\$621.63
Less: Officers' salaries.....	13,200.00	
Long-term capital loss shown on your return..		30.00
Net additional income.....	\$ 4,703.66	\$591.63
1943		
Reported on Forms 1065.....	\$42,086.52	
Less: Officers' salaries.....	13,200.00	
Net additional income.....	\$28,886.52	
1944		
Reported on Forms 1065.....	\$66,002.66	\$116.67
Less: Officers' salaries.....	\$13,200.00	
Contributions	500.31	13,700.31
Net additional income.....	\$52,302.35	\$116.67

(c) It is held that you did not sustain a net operating loss during the year 1941. Therefore, you are not entitled to a net operating loss carryover, and the net operating loss deductions claimed on your 1942 and 1943 returns, in the amounts of \$904.83 and \$248.55, respectively, are disallowed.

Computation of Tax

Declared Value Excess-Profits Tax Computation

1. Net income for declared value excess-profits tax computation adjusted	\$5,951.57
2. Less: 10% of \$25,000.00 value of your capital stock as declared for the year ended 6-30-42.....	2,500.00
3. Net income subject to declared value excess-profits tax.....	\$3,451.57

Portion	Amount	Rate	Tax
5% of declared value of capital stock (but not more than L. 3).....	\$1,250.00	6.6%	\$ 82.50
4. Balance	\$2,201.57	13.2%	290.61
5. Total declared value excess-profits tax.....			373.11
6. Declared value excess-profits tax previously assessed, Account No. NC-41023.....			None
7. Deficiency			\$ 373.11

Income Tax Computation—Normal Tax Net Income Computation			
Net income for declared value excess-profits tax computation adjusted			\$5,951.57
Less: Declared value excess-profits tax.....			373.11
Normal-tax and surtax net income.....			\$5,578.46

Alternative Method

Normal tax and surtax net income.....	\$5,578.46
Less: Excess of net long-term capital gain over net short-term capital loss.....	591.63
Ordinary net income subject to income tax.....	\$4,986.83
Normal tax at 15% on \$4,986.83.....	\$ 748.02
Surtax at 10% on \$4,986.83.....	\$ 498.68
25% of net long-term capital gain.....	\$ 147.91
Total income tax liability.....	\$1,394.61
Income tax assessed, Account No. NC-41023.....	None
Deficiency in income tax.....	\$1,394.61

Taxable Year Ended December 31, 1943

Adjustments to Net Income

Net income as disclosed by return.....	\$ 739.43
Unallowable deductions and additional income:	
(a) Other income	\$28,886.52
(b) Net operating loss deduction.....	248.55
Net income adjusted.....	\$29,874.50

Explanation of Adjustments

- (a) See Item (a), 1942, above.
- (b) See Item (c), 1942, above.

Computation of Tax—Internal Revenue Code—Corporation

Declared Value Excess-Profits Tax Computation

1. Net income for declared value excess-profits tax computation adjusted.....				\$29,874.50
2. Less: 10% of \$10,000 value of capital stock as declared for the year ended 6-30-43.....				1,000.00
3. Net income subject to declared value excess-profits tax.....				\$28,874.50
Portion	Amount	Rate	Tax	
5% of declared value of declared value of capital stock (but not more than L. 3).....	\$ 500.00	6.6%	\$	33.00
4. Balance	28,374.50	13.2%		3,745.43
5. Total declared value excess profits tax.....			\$	3,778.43
6. Declared value excess-profits tax previously assessed, Account No. 420506.....				None
7. Deficiency of declared value excess-profits tax.....			\$	3,778.43

Income Tax Computation

Normal Tax Net Income Computation

Net income for declared value excess-profits tax computation adjusted	\$29,874.50
Less: Declared value excess-profits tax.....	3,778.43
Net income	\$26,096.07
Less: Income subject to excess profits tax.....	13,484.11
Normal-tax and surtax net income.....	\$12,611.96

Normal Tax Computation

Domestic Corporations With Normal-Tax Net Incomes
Not Over \$50,000

Normal-tax net income.....				\$12,611.96
Portion of normal-tax net income (not in excess of \$5,000); and tax.....	\$ 5,000.00	15%	\$	750.00
Portion of normal-tax net income (in excess of \$5,000 and not in excess of \$20,000); and tax.....	7,611.96	17%		1,294.03
Total normal tax.....			\$	2,044.03

Corporations With Surtax Net Incomes Not Over \$50,000

	Portion	Rate	Amount of Tax
Portion of surtax net income (not in excess of \$25,000) ; and tax.....	\$12,611.96	10%	\$ 1,261.20
Total normal tax and surtax.....			\$ 3,305.23
Income tax assessed:			
Account No. 420506.....			184.85
Deficiency of income tax.....			\$ 3,120.38

Since no excess profits tax has been filed for this year, your excess profits net income has been determined as follows:

Income:

(a) Net income adjusted, as above.....	\$29,874.50
(b) 50% of interest on borrowed capital.....	29.16
Total	\$29,903.66
Less: (c) Declared value excess profits tax.....	3,778.43
Excess profits net income.....	\$26,125.23

Computation of Excess Profits Credit

Money paid in for stock.....	\$94,600.00
Accumulated earnings and profits.....	398.67
Average borrowed invested capital.....	515.39
Invested capital	\$95,514.06
Excess profits credit at 8% of \$95,514.06.....	\$ 7,641.12

Excess Profits Tax Computation

1. Excess profits net income.....	\$26,125.23
2. Less: Specific exemption	\$5,000.00
3. Excess profits credit.....	7,641.12
4. Adjusted excess profits net income.....	\$13,484.11
5. 90% of Item 4.....	12,135.70
6. Less: Credit for debt retirement, 40% of \$2,061.54.....	824.62
7. Correct excess profits tax liability.....	\$11,311.08
8. Previous assessment	None
9. Deficiency in excess profits tax.....	\$11,311.08

Taxable Year Ended December 31, 1944

Adjustments to Net Income

Net income as disclosed by return.....	\$	559.42
Unallowable deductions and additional income:		
(a) Other income	\$52,302.35	
(b) Long-term capital gain.....	116.67	52,419.02
Net income adjusted.....		<u>\$52,978.44</u>

Explanation of Adjustments

- (a) See Item (a), 1942, above.
 (b) See Item (c), 1942, above.

Computation of Tax

Declared Value Excess-Profits Tax Computation

Net income adjusted.....	\$52,978.44		
Less: Net long-term capital gain.....	116.67		
Net income for declared value excess- profits tax computation.....			<u>\$52,861.77</u>
Less: 10% of \$25,000, value of capital stock as declared for the year ended 6-30-44.....			2,500.00
Net income subject to declared value excess-profits tax.....			<u>\$50,361.77</u>
Portion	Amount	Rate	Tax
5% of declared value of capital stock (but not more than L. 3).....	\$ 1,250.00	6.6%	\$ 82.50
4. Balance	49,111.77	13.2%	6,482.75
5. Total declared value excess-profits tax.....			<u>\$ 6,565.25</u>
6. Declared value excess-profits tax assessed, Account No. 4200582.....			None
7. Deficiency of declared value excess-profits tax.....			<u>\$ 6,565.25</u>

Income Tax Computation—Normal-Tax Net Income Computation

Net income for declared value excess-profits tax computation	\$52,861.77	
Add: Excess of net long-term capital gain over net short-term capital loss.....	116.67	
Total	<u>\$52,978.44</u>	
Less: Declared value excess-profits tax.....	6,565.25	
Net income	<u>\$46,413.19</u>	
Less: Adjusted excess profits net income.....	28,728.55	
Normal tax and surtax net income.....		<u>\$17,684.64</u>

Computation of Income Tax
Alternative Method

Normal tax and surtax net income.....	\$17,684.67
Less: Net long-term capital gain.....	116.67
Ordinary income subject to income tax.....	\$17,568.00
Normal tax at 15% on \$5,000.00.....	\$ 750.00
Normal tax at 17% on \$12,568.00.....	2,136.56
Surtax at 10% on \$17,568.00.....	1,756.80
25% of net long-term capital gain.....	29.17
Total income tax liability.....	\$ 4,672.53
Income tax assessed, Account No. 4200582.....	139.85
Deficiency in income tax.....	\$ 4,532.68

Since no excess profits tax return has been filed for this year, your excess profits net income has been determined as follows:

Income:

(a) Net income, adjusted, as above.....\$52,978.44

Less:

(b) Net long-term capital gain.....\$ 116.67
(c) Declared value excess-profits tax..... 6,565.25 6,681.92

Excess profits net income.....\$46,296.52

Excess Profits Tax Computation

1. Excess profits net income.....	\$46,296.52
2. Less: Specific exemption	\$10,000.00
3. Excess profits credit, 8% of \$94,600....	7,568.00 17,568.00
4. Adjusted excess profits net income.....	\$28,728.52
5. 95% of Item 4.....	\$27,292.09
6. Less: Current credit.....	2,729.21
7. Correct excess profits tax liability.....	\$24,562.88
8. Previous assessment	None
9. Deficiency in excess profits tax.....	\$24,562.88

Filed T.C.U.S. December 24, 1947.

[Title of Tax Court and Cause.]

ANSWER

Comes Now the Commissioner of Internal Revenue, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies that he erred in his determination as set forth in the notice of deficiency from which petitioner's appeal is taken. Specifically denies that he erred in the manner and form alleged in paragraph 4(a) to (f), inclusive, of the petition.

5(a). For lack of sufficient knowledge or information upon the basis of which to form a belief as to the truth or falsity thereof, denies the allegations contained in paragraph 5(a) of the petition.

(b) and (c). Denies the allegations contained in paragraph 5(b) and (c) of the petition.

(d). Admits the allegations contained in paragraph 5(d) of the petition.

(e). Denies the allegations contained in paragraph 5(e) of the petition.

6. Denies generally and specifically each and every material allegation contained in the petition not hereinabove specifically admitted, qualified or denied.

WHEREFORE, it is prayed that the petitioner's appeal be denied and that the Commissioner's determinations of deficiencies and penalties be approved.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal
Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel,
JOHN H. PIGG,
R. G. HARLESS,
Special Attorneys,
Bureau of Internal
Revenue.

Received and filed T. C. U. S. February 23,
1948.

Before The Tax Court of The United States

Docket No. 16845

In the Matter of:

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

(Met pursuant to notice)

Before: Honorable Luther Johnson,
Judge.

Appearances:

CARL E. DAVIDSON, ESQ.,

1525 Yeon Building,

Portland, Oregon,

appearing on behalf of the Petitioner.

RALPH R. BAILEY, ESQ.,

723 Pittock Block,

Portland, Oregon,

appearing on behalf of the Petitioner.

JOHN H. PIGG, ESQ.,

appearing on behalf of the Commissioner
of Internal Revenue, Respondent. [1*]

* Page numbering appearing at top of page of original Reporter's Transcript.

PROCEEDINGS

The Court: The Clerk will call the calendar.

The Clerk: Docket No. 16845, Twin Oaks Company.

Mr. Davidson: Carl E. Davidson and Ralph R. Bailey, for the Petitioner.

Mr. Pigg: John H. Pigg for the Respondent.

Mr. Davidson: I would like to move the Court to withdrawal of Spencer R. Collins as counsel for the Petitioner, substituting my own entry, as well as the appearance of Mr. Bailey.

The Court: The motion is granted. Does counsel wish to make a statement of the nature of the case involved?

Opening Statement on Behalf of the Petitioner

By Mr. Davidson:

This involves the corporation income declared profits and declared excess profits asserted against the Twin Oaks Corporation for the year 1942. The facts in the case are, briefly, these:

Prior to January 2, 1941, a corporation by the name of Twin Oaks Builders Supply Company was in the lumber and builders' supply business, with a principal place of business in Eugene, Oregon. The stock of that corporation was owned one half by Mr. Rogers, and the other half by Mr. and Mrs. Scharpf, but out of that half owned by Mr. and Mrs. Scharpf, Mrs. Scharpf had acquired forty-six per cent and the remainder belonged to Mr. Scharpf, or four per cent. Now, Mr.

Scharpf [2] desired to have a greater interest in the business and insisted upon the company being dissolved, or, rather, upon the formation of a partnership where he could have equal interest in the company, and Mrs. Scharpf was agreeable to that. So, the corporation, after due consultation between the stockholders, was retained as a holding company, holding certain real property and office equipment. Accordingly, a new partnership was formed under the name of Twin Oaks Builders Supply Company, the name of the corporation being changed to Twin Oaks Company, its present name. That partnership purchased from the corporation the inventory and inventory values, which were cost or market, whichever was the lesser; also delivery equipment at book value, accounts receivable at face value, and took over the cash at face value.

The Court: Was it a partnership or a corporation which owned the assets?

Mr. Davidson: A corporation, Your Honor. The partnership then entered into an agreement with the corporation for the rental of its property at \$250 a month, which was the value of the rental, a fair rental value; the business was thereafter conducted in the name of the partnership. The corporation continued as a holding company and collected rental upon its assets.

The Commissioner in this case has attacked the partnership, disallowing the status of both the wives as members [3] of the partnership. A de-

iciency notice was filed, and the tax was paid, on that basis.

The Court: What year?

Mr. Davidson: For the years 1942, 1943 and 1944. The tax is really the income for 1944, but it involves the income for those three years. Notwithstanding that, the Respondent has determined that all the income shall be taxed to the corporation for all purposes. The basis upon which the Respondent has made this claim is shown in the letter accompanying the deficiency notice, and the pertinent part of that letter reads as follows: "It has been determined that the transactions by which (1) a partnership purported to be organized, or formed, under the name of Twin Oaks Builders' Supply Company, (2) your corporation purported to transfer certain of its properties to the alleged partnership and (3) your corporation purported to lease its real estate, buildings, furniture and fixtures to the alleged partnership, are without substance and are to be disregarded for federal income tax purposes. Accordingly, the net income derived from the operation of the business conducted in the name of the Twin Oaks Builders' Supply Company for each of the years 1942, 1943 and 1944 has been included in your taxable income for each of said years." It is our contention that these assets were purchased at fair market value, and that the properties of the corporation were leased at a fair rental value, and [4] that no transactions have been conducted by the corporation

so far as the sale of merchandise is concerned or any business, since that time; and upon that basis, the proper tax is to be on the members of the partnership.

Opening Statement on Behalf of the Respondent
By Mr. Pigg:

If the court please, I think counsel has given the court a fair picture of the background out of which the controversy arises, the issue being whether the income derived from the business carried on under the name of the purported partnership, the Twin Oaks Builders' Supply Company, for each of the years 1942, 1943 and 1944, is attributable to and should be included in the taxable income of this corporation, the Petitioner for those taxable years.

I would like to address myself next to counsel's observations insofar as they were directed to any determination or action of the Commissioner that is not directly involved in this proceeding, that is, to the determination or action as to which the partners, as such, were notified and by proper deficiency notice, that the partnership was not recognized for tax purposes insofar as their respective wives were purported to be partners, and proposing to tax the income attributable to the wives under the partnership arrangement to the husbands.

The court has no doubt already and no doubt it will be observed before the close of this proceed-

ing, that this was an action taken by the Respondent for the purpose of [5] protecting the revenue in the Government's interest. Insofar as those actions were inconsistent with the determinations as here made, the remedy of the parties involved, that is, the stockholders of this Petitioner corporation and the corresponding partnership under the partnership arrangement, is by way of claim of refund if they have paid the tax.

Mr. Davidson has read to the court the paragraph of the deficiency notice, that is, the statement which accompanied the deficiency notice, which contains the essence of the Commissioner's determination in this case, and, consistent with that determination, it is the position and contention of the Respondent that his determination here should be sustained, because, as we believe will be shown by the evidence, this purported partnership was merely a tax-saving device, looking into business realities, whereby the Petitioner sat and seeks to channel its income not only to its stockholders, as such, but to the members of the immediate family.

Another principle upon which the Commissioner here relies is that, although the taxpayer may be allowed to choose whatever way he likes for the carrying on of his business, the Government is not required to acquiesce in the form so elected by the taxpayer, and it may require a look into the actualities, and if it is determined that the form that is so elected by the taxpayer is a sham

or lacking in reality, or fiction, the Government may accept or disregard the fiction [6] as best suits the purposes of the tax statute.

We believe it will be further shown that the arrangement which will be shown in this case are tantamount to an anticipatory arrangement, that is, an anticipatory assignment of income; and it is our contention that any anticipatory assignment of income, through whatever form or whatever guise it may be accomplished, that does not absolve the Petitioner from tax liability, on the further ground that the economic realities not the legal formalities determine the tax competency, and that income is taxable to its creator or controller and not to its collector or beneficiary.

The determination in this case is not predicated upon Section 45 of the Internal Revenue Code, which relates to the election as between one taxable entity and another, and certain items of income and certain items of deduction in order to determine the true income. The determination here is that the alleged partnership is without substance and should be disregarded, and therefore there is no taxable entity for the purpose of recognition, or the application of the provisions of Section 45. However, I did not mean to undertake, if I could, to waive any provision of Section 45 or any other section of the Code. That I could not do if I attempted to. If it should appear, upon the conclusion of the evidence in this case, that Section 45 has any application, the Commissioner,

of course, may rely on that section if it appears proper, and [7] to the extent that it is proper; but it is certain that any such reliance would be in the alternative. I think that is all I have.

Mr. Davidson: Your Honor, I have a number of exhibits which counsel has consented may be introduced without objection.

The Court: You have a stipulation of facts?

Mr. Davidson: We have been unable to arrive at a stipulation of facts.

Mr. Pigg: Let the record show that it is not the result of any inability on the part of counsel to get along, but there just are not enough hours in the day, or days in the week.

Mr. Davidson: Your Honor, counsel wishes to stipulate that these exhibits may be introduced without further identification, and without objection, it being understood that counsel is not bound by any descriptive words in any caption, particularly relating to any determination by the Respondent that the corporation, or heading of "partnership" is a concession that there was a bona fide partnership.

Mr. Pigg: And that extends to the word "partnership" or similar words throughout the trial, and we consent to its use merely for identification purposes.

Mr. Davidson: We offer as Petitioner's Exhibit 1 a statement of the balance sheets of the Twin Oaks Company, the corporation, for the years ending 1935 to 1944, inclusive, including a state-

ment of bookkeeping entries upon transfer of [8] the assets to the 'Twin Oaks Builders' Supply Company, a partnership, in January of 1941; that is, the balance sheet on January 1, 1941, giving effect to that transfer.

The Court: In other words, what you have just said is contained in Petitioner's No. 1?

Mr. Davidson: That is right.

The Court: It will be admitted and marked as Petitioner's 1.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 1.)

Mr. Davidson: We offer as Petitioner's Exhibit No. 2, the income statement of the Twin Oaks Company for the calendar years 1941 to 1944, inclusive.

The Court: It will be admitted and marked as Petitioner's 2.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 2.)

Mr. Davidson: We offer as Petitioner's 3, a statement of the income account in the sales of the Twin Oaks Company, then known as Twin Oaks Builders' Supply Company, for the calendar years 1935 to 1940, inclusive.

The Court: It will be admitted and marked as Petitioner's 3.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 3.) [9]

Mr. Davidson: As Petitioner's 4, we offer the balance sheet of the Twin Oaks Builders' Supply Company, a partnership, as of January 1, 1941, and as of December 31 of each year, that is, 1941 to 1944, inclusive.

The Court: It will be admitted and marked as Petitioner's 4.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 4.)

Mr. Davidson: As Petitioner's 5, we offer a statement of the income account of the Twin Oaks Builders' Supply Company, a partnership, for the calendar years 1941 to 1944.

The Court: It will be received and marked as indicated.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 5.)

Mr. Davidson: As Petitioner's 6, we offer a statement of the analysis of the partners' investment accounts of the Twin Oaks Builders' Supply Company from January 1, 1941, through December 31, 1944.

The Court: It will be admitted and marked as Petitioner's 6.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 6.)

Mr. Davidson: And as Petitioner's Exhibit No. 7, we offer a statement of the original capital in-

vestments of [10] the partners of the Twin Oaks Builders' Supply Company, a partnership, at January 1, 1941.

The Court: It will be admitted and marked as Petitioner's 7.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 7.)

Mr. Davidson: As Petitioner's 8, we offer a copy of the minutes of the special meeting of the stockholders of Twin Oaks Builders' Supply Company, which was held on January 2, 1941.

The Court: It will be received in evidence and marked as Petitioner's Exhibit No. 8.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 8.)

Mr. Davidson: As Petitioner's Exhibit No. 9, we offer a copy of the minutes of the special meeting of the Board of directors of the Twin Oaks Builders' Supply Company, a corporation, dated January 2, 1941.

The Court: It will be received and marked as indicated.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 9.)

Mr. Davidson: And as Petitioner's Exhibit No. 10, we offer the statement of notes receivable by the Twin Oaks Company, a corporation, from the Twin Oaks Builders' Supply [11] Company, a part-

nership, showing the balance on January 1, 1941; also the dates and amounts of the subsequent payments of both interest and principal, with the remaining balance after the making of each of the payments.

The Court: It will be received and marked as Petitioner's 10.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 10.)

Mr. Davidson: As Petitioner's 11, we offer a photostatic copy of the note dated January 2, 1941, made between,—from the Twin Oaks Builders' Supply Company, a partnership, to the Twin Oaks Company, a corporation, in the amount of \$89,378.35.

The Court: It will be received in evidence and marked as Petitioner's 11.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 11.)

Mr. Davidson: And as Petitioner's Exhibit 12, we offer a photostatic copy of a note dated January 2, 1942, from the Twin Oaks Builders' Supply Company, a partnership, to the Twin Oaks Company, a corporation, in the amount of \$78,330.95. I don't know whether I stated it was January 2, 1942, but that is the date of it.

The Court: It will be received and marked as indicated. [12]

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 12.)

Mr. Davidson: It is stipulated that Petitioner's 12 is a renewal note for Petitioner's 11.

The Court: Is that so stipulated?

Mr. Pigg: We so stipulated.

The Court: It will be noted.

Mr. Davidson: As Petitioner's Exhibit No. 13, we offer a photostatic copy of a note from the Twin Oaks Builders' Supply Company, a partnership, to the Twin Oaks Company, a corporation, dated December 31, 1942, in the amount of \$55,-296.14. Counsel stipulates that is a renewal of Petitioner's Exhibit 12.

The Court: Does Respondent agree, and is it so stipulated?

Mr. Pigg: It is so stipulated.

The Court: It will be noted.

Mr. Davidson: We offer that in evidence as Petitioner's 13.

The Court: It will be received and marked as Petitioner's 13.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 13.)

Mr. Davidson: As Petitioner's Exhibit 14, we offer a statement of the rentals received by the Twin Oaks Company [13] from the Twin Oaks Builders' Supply Company, that is, received by Twin Oaks Company, the corporation, from Twin Oaks Builders' Supply Company, the partnership, showing the amounts of payments by years, from

the year 1941 to 1944, inclusive, and by months or shorter periods thereafter.

The Court: It will be admitted and marked as Petitioner's 14.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 14.)

Mr. Davidson: As Petitioner's 15, we offer a copy of the partnership agreement dated January 1, 1941, executed on January 25, 1941, between John J. Rogers, Louis C. Scharpf, Eva M. Scharpf and Corabelle Rogers.

The Court: It will be received and marked as Petitioner's 15.

(The Document referred to was marked and received in evidence as Petitioner's Exhibit 15.)

Mr. Davidson: As Petitioner's 16, we offer a *copy a* supplement to the partnership agreement of Twin Oaks Builders' Supply Company, which was executed on January 30, 1941, made as of January 1, 1941, between John J. Rogers, Corabelle M. Rogers, Louis C. Scharpf and Eva M. Scharpf.

The Court: It will be received and marked as indicated.

(Whereupon the document referred to was marked and received in evidence as Petitioner's Exhibit 16.) [14]

Mr. Davidson: As Petitioner's Exhibit 17, we offer a contract of lease into January 2, 1941, between the Twin Oaks Company, the corporation,

as lessor and the Twin Oaks Builders Supply Company, a partnership, as lessee, *consisting John J. Rogers, Corabelle M. Rogers, Louis C. Scharpf and Eva N. Scharpf.*

The Court: It will be received and marked as indicated.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 17.)

Mr. Davidson: As Petitioner's 18, we offer a transcript of the stock record book of the Twin Oaks Company, a corporation, reflecting stock issued prior to January 1, 1941, issued and outstanding to January 1, 1945.

The Court: It will be received and marked as Petitioner's 18.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 18.)

Mr. Davidson: As Petitioner's 19, we offer a copy of an assumed business name certificate filed by John J. Rogers, L. C. Scharpf, Corabelle M. Rogers and Eva N. Scharpf, dated January 2, 1941. And it is stipulated, I understand, it was filed in the County records of Lane County, Oregon.

The Court: Is it stipulated?

Mr. Pigg: Yes. [15]

The Court: What was the date it was filed?

Mr. Davidson: I will see.

The Court: Is that Exhibit 19?

Mr. Davidson: Yes. It is stipulated between counsel that this certificate was filed in the county

records of Lane County, Oregon, on January 18, 1941.

Mr. Pigg: It is so stipulated.

The Court: It will be received as designated.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 19.)

Mr. Davidson: As Petitioner's Exhibit 20, an official statement showing officially recorded Building Permits for the years 1914 to 1947, inclusive.

The Court: It will be received and marked as indicated.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 20.)

Mr. Davidson: As Petitioner's 21, we submit a copy of the notification by John J. Rogers, L. C. Scharpf, Eva N. Scharpf and Corabelle M. Rogers to the First National Bank of Eugene, Oregon, constituting a continuing ability to carry on banking transactions, being dated January 27, 1944.

The Court: It will be received in evidence and marked as indicated.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 21.)

Mr. Davidson: As Petitioner's 22, we submit a statement carrying the opening journal entries on January 1, 1941, of the books of the Twin Oaks Builders Supply Company, a partnership.

The Court: It will be received in evidence and marked as Petitioner's 22.

(The document referred to was marked and received in evidence as Petitioner's Exhibit 22.)

Mr. Davidson: That is all the exhibits I have to offer at this time.

The Court: You may proceed with the testimony

Mr. Davidson: I would like to call Mr. L. C. Scharpf.

Whereupon,

LOUIS C. SCHARPF

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Will you state your name?

A. Louis C. Scharpf.

Q. Where do you reside, Mr. Scharpf?

A. Eugene, Oregon.

Q. Are you connected with the Twin Oaks Company, the Petitioner in this case? [17]

A. Yes, I am.

Q. Are you connected with the Twin Oaks Builders Supply Company, a partnership? A. Yes.

Q. What is your position in the Twin Oaks Company, a corporation?

A. I am secretary-treasurer.

Q. Are you a stockholder of that corporation?

A. Yes.

Q. What number of shares of stock do you own?

A. Well, thirty six and three tenths shares.

(Testimony of Louis C. Scharpf.)

Q. What percentage of the total issued and outstanding stock is that?

A. It is a little less than four per cent.

Q. What is your position in the Twin Oaks Builders Supply Company, a partnership?

A. I own one fourth interest.

Q. The other partners in the partnership are who?

A. John J. Rogers, Eva M. Scharpf and Corabelle N. Rogers.

Q. Eva M. Scharpf is your wife?

A. Yes.

Q. And Corabelle N. Rogers is the wife of Mr. Rogers? A. Yes.

Q. When did you first become connected with the [18] corporation now known as the Twin Oaks Company? A. 1926.

Q. What was the name of the corporation at that time?

A. It was Twin Oaks Lumber Company.

Q. In what manner did you first become connected with that company?

A. Mrs. Scharpf bought a large majority of the stock from a fellow by the name of Vick Anderson, and I bought one share at the time, which was a half interest in the lumber company.

Q. The purchases by you and Mrs. Scharpf were a half interest in the lumber company?

A. Yes.

(Testimony of Louis C. Scharpf.)

Q. You bought one share, and she bought the balance? A. Yes.

Q. Did Mrs. Scharpf have separate funds of her own with which to buy the stock? A. Yes.

Q. How did she get it?

A. She inherited a little fortune from her mother.

Q. And did all the money that she put into the stock purchase come from her separate funds?

A. That is right.

Q. When was the name of the corporation changed from Twin Oaks Lumber Company? [19]

A. That was probably about 1929 or 1930. It was at the time we took on the agency for the Roebling Wire Rope Company, and they would not sell us any wire rope as long as we had the name "lumber" connected with the company.

Q. When was the name changed?

A. About 1929 or 1930, I don't remember exactly.

Q. And what was the name changed to?

A. We changed it to "Twin Oaks Builders Supply Company."

Q. And when was it changed again?

A. It was changed again on January 1, 1941, when we formed the partnership and used the corporation as a holding company.

Q. Whose idea was it to form the partnership?

A. It was my idea.

Q. Why did you want to form the partnership?

(Testimony of Louis C. Scharpf.)

A. Well, I was a very minor stockholder in the corporation, holding less than four per cent of the stock, and I finally became rather discouraged about having such a minor interest in the company, and finally proposed to Mr. Rogers that we form a partnership in which I wanted a one fourth interest, and to buy out the assets of the Twin Oaks Builders Supply Company, a corporation.

Q. Did Mr. Rogers agree to that proposition?

A. Well, not for a long time. We argued about it for a year or more, and finally he came back with a proposal that [20] he would want to retain the corporation as a holding company for the real estate.

The Court: For what?

The Witness: For the real estate; and that he was agreeable to forming a partnership to operate the business, selling the merchandise, and so on.

Mr. Davidson: Was that satisfactory to you?

The Witness: Well, it was finally agreed on, on a compromise; that was the gist of it, and we formed the partnership with the four of us, each having an equal interest.

The Court: What was the interest of each of the four of you?

The Witness: One fourth interest.

The Court: All equal owners?

The Witness: Yes. My first idea was that it would be Mrs. Scharpf one fourth, myself one fourth and Mr. Rogers one half, and then after he

(Testimony of Louis C. Scharpf.)

made the suggestion that his wife come in as one of the partners, we agreed to that; and I agreed to the idea to have the corporation to stand as a corporation. It was as early as 1938 or 1939 that we were talking about the proposition. At that time the State Highway Commission was talking about surveys through our property, and in 1940 they made a survey right through our property, right through one corner of it, and also through our property at Cottage Grove. So I thought it was all right, that the [21] corporation wouldn't have much anyway, and that it would wind up in a short time. I thought the Highway Department was going to take our property, anyway, so it was all right to leave that in the corporation.

Q. How were the assets acquired from the corporation? A. How were they acquired?

Q. How did the partnership acquire the assets of the corporation?

A. The four partners put in two thousand dollars apiece making a total of eight thousand dollars capital, and then we gave a note for the balance, which amounted to, I think, eighty nine thousand and some odd dollars.

The Court: When you say "we," do you mean all the four partners?

The Witness: It was a note signed by the Twin Oaks Builders Supply Company, the partnership, and of course all the partners were liable on it, so far as that goes.

(Testimony of Louis C. Scharpf.)

Q. (By Mr. Davidson): I hand you Petitioner's Exhibit No. 11, and I will ask you if that is the note that was given for the initial payment,—a copy of the note (hands document to witness).

A. That is the one, yes.

Q. What assets did the partnership take over from the corporation?

A. Well, they took over all the assets except the real [22] estate and the furniture and the fixtures. In other words, they took over the assets, such as the stock of merchandise, the book accounts, the trucks, the cash on hand, the cash in the bank, and assumed the accounts payable and all the debts of the corporation.

Q. At what price did the partnership take over the inventory?

A. It was taken over at our usual manner of inventory, at cost or market.

Q. Whichever was the lower?

A. That is right.

Q. Did you consider that was a fair price for the inventory at the time? A. Yes.

Q. At what price did you take over the trucks?

A. At the book value.

Q. Did you consider that a fair price?

A. Yes.

Q. At what price did you take over the accounts receivable of the corporation?

A. One hundred cents on the dollar.

Q. Did you consider that a fair price?

(Testimony of Louis C. Scharpf.)

A. I figured that was more than a fair price.

Q. What are the physical characteristics of the real property that the corporation was occupying? In other words, [23] what did it consist of?

A. Well, it was a lumber shed and a warehouse, with a vacant lot in Eugene. It was a small lumber shed in Junction City, and a store building there which we rented; in Cottage Grove it was a warehouse and two vacant lots, in which at one time we operated a store.

Q. At the time of the purchase the Cottage Grove store was vacant? A. That is right.

Q. Did the partnership acquire the right to occupy the Cottage Grove property? A. Yes.

Q. Did they acquire the right to occupy the Eugene property? A. Yes.

Q. And the Junction City property?

A. Yes.

Q. You say the Junction City property was not owned by the corporation but rented by the corporation?

A. Well, the main building, the concrete building that we had the store in, that was owned by a Mrs. Cook, and we had it leased from her.

Q. What did the partnership do with the lease?

A. They carried it on.

Q. Did the partnership thereafter pay the rent?

A. Yes.

Q. What did the balance of the Junction City property consist of?

(Testimony of Louis C. Scharpf.)

A. It consisted of several lots in back of the store, on which there was a one-story lumber shed.

Q. A one-story lumber shed? A. Yes.

Q. Was there a large investment there?

A. No.

Q. About how much?

A. Several thousand dollars.

Q. What do you mean by "several"?

A. How is that?

Q. What do you mean by "several"?

A. Well, I am guessing at it, I would say about three thousand dollars, maybe.

Q. And the Cottage Grove property was vacant at that time? A. Yes.

Q. Now, what rental did the partnership agree to pay to the Corporation? A. \$250 a month.

Q. Did you consider that a fair rental?

A. Yes.

Q. Now, taking over these assets, in whose name was the [25] merchandise purchased?

A. It was purchased in the name of the Twin Oaks Builders Supply Company, the partnership.

Q. In whose name were the sales made?

A. The same, Twin Oaks Builders Supply Company, the partnership.

Q. Did the Twin Oaks Builders Supply Company have the bank account? A. Yes.

Q. The partnership, that is? A. Yes.

Q. Did the corporation have a bank account?

A. Yes.

(Testimony of Louis C. Scharpf.)

Q. Were the funds to pay the liabilities of the partnership drawn from its bank account?

A. That is right.

Q. Did the corporation pay any of the operating expenses? That is, operating expenses of the partnership?

A. No sir.

Q. Did the partnership register with the various governmental authorities as an employing entity?

A. Yes, it did.

Q. What did the merchandise consist of?

A. The merchandise is lumber, coal, explosives, hardware, paint, roofing, nails, plaster, lime, cement; anything [26] that is used for the building game.

The Court: What was the aggregate value of this real estate that the corporation retained title to?

The Witness: Of the real estate?

The Court: Yes; what was its aggregate value?

The Witness: Well, as I remember, the book value was about \$37,000.

The Court: How did that compare with the merchandise that the partnership took over.

The Witness: I would say the merchandise would be larger than that.

The Court: Larger?

The Witness: Yes.

The Court: Much larger?

The Witness: Well, I don't remember that.

Q. (By Mr. Davidson): I hand you Petition-

(Testimony of Louis C. Scharpf.)

er's 22, received in evidence Mr. Scharpf, and ask you if you can tell from that as to the value of the purchase price at which the inventory was taken over (hands document to witness).

A. You want the total?

Q. Just the merchandise?

A. The merchandise?

Q. Yes. A. \$70,892.48. [27]

Q. Mr. Scharpf, I hand you a document marked for the purpose of identification as Petitioner's 23, will you identify that?

(The document referred to was marked as Petitioner's Exhibit No. 23 for identification.)

A. It is our notice of engaging in a hazardous occupation by the Twin Oaks Builders Supply Company, as filed with the State Industrial Accident Commission.

Q. With whom was that filed?

A. It was filed on behalf of the Twin Oaks Builders Supply Company, naming the partners, Louis C. Scharpf, Eva M. Scharpf, Corabelle M. Rogers and John C. Rogers as partners. It was filed with the State Industrial Accident Commission.

Q. Will you state whether that was signed by you and approximately the date it was dated?

A. On January 16, it was signed by the Twin Oaks Builders Supply Company, L. C. Scharpf, partner.

Q. Have you continued to carry the Industrial

(Testimony of Louis C. Scharpf.)

Accident Commission insurance with the State of Oregon? A. Yes.

Q. Have you carried it in the name of the partnership? A. Yes.

Mr. Davidson: I offer that in evidence.

Mr. Pigg: No objection.

The Court: It will be received and marked as [28] Petitioner's 23.

(The document referred to, heretofore marked as Petitioner's Exhibit 23 for identification, was received in evidence as Petitioner's Exhibit 23.)

Mr. Davidson: I would like to have another one marked here.

The Clerk: Petitioner's 24 for identification.

(The document referred to was marked as Petitioner's Exhibit No. 24 for identification.)

Q. (By Mr. Davidson): Mr. Scharpf, I hand you a letter which has been marked for identification as Petitioner's 24, will you tell me what that is (hands document to witness)?

A. That is a letter from the State Unemployment Compensation Commission at Salem, saying that our registration for unemployment compensation had been received and filed.

Q. And upon whose behalf was that registration made?

A. That was made on behalf of the Twin Oaks Builders Supply Company.

Q. The partnership?

(Testimony of Louis C. Scharpf.)

A. The partnership, yes.

The Court: What is the date of the letter?

Mr. Davidson: The letter is dated January 25, 1941. I would like to offer that in evidence.

The Court: Is there any objection? [29]

Mr. Pigg: No objection.

The Court: It will be received and marked as Petitioner's 24.

(The document referred to, heretofore marked as Petitioner's Exhibit 24 for identification, was received in evidence as Petitioner's Exhibit 24.)

Mr. Davidson: And I have another one here, also, which I would like to have the Clerk mark.

The Clerk: Petitioner's 25 for identification.

(The document referred to was marked as Petitioner's Exhibit No. 25 for identification.)

Q. (By Mr. Davidson): Mr. Scharpf, I hand you a document which has been marked for identification as Petitioner's 25. Will you tell me what that is (hands document to witness)?

A. This is a notice of employer's identification number issued by the Treasury Department, Bureau of Internal Revenue, of the Twin Oaks Builders Supply Company, a partnership, with the owners named as John J. Rogers, Corabelle N. Rogers, Louis C. Scharpf and Eva M. Scharpf, using the trade name of Twin Oaks Builders Supply Company, a partnership.

Q. By whom was that issued?

(Testimony of Louis C. Scharpf.)

A. That was issued by the Treasury Department, Internal Revenue Service.

Mr. Davidson: I offer that. [30]

The Court: Is there any objection?

Mr. Pigg: No objection.

The Court: It will be admitted and marked as Petitioner's 25.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 25 for identification, was received in evidence as Petitioner's Exhibit No. 25.)

Mr. Davidson: May I also have this identified?

The Clerk: Petitioner's 26 for identification.

(The document referred to was marked as Petitioner's Exhibit No. 26 for identification.)

Q. (By Mr. Davidson): Mr. Scharpf, I hand you a group of documents, which I pinned together and had marked for identification as Petitioner's 26. Will you identify those, please (hands documents to witness)?

A. These are all the employers contributions, or contribution reports issued by the State Unemployment Compensation Commission at Salem, Oregon.

Q. Would you say by whom these reports were made?

A. This one was made by the Twin Oaks Builders Supply Company.

Q. Are there any made by the Twin Oaks Company?

(Testimony of Louis C. Scharpf.)

A. Yes, there are; this one here is Twin Oaks Company (indicating). [31]

Q. Do these cover the period of 1941?

A. Yes; they are all 1941.

Mr. Davidson: I will offer that in evidence.

Mr. Pigg: No objection.

The Court: Are they all in one document, bradded together?

Mr. Davidson: Yes, they are firmly bradded together.

The Court: All right.

Mr. Davidson: I will offer this.

Mr. Pigg: No objection.

The Court: It will be received as Petitioner's 26.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 26 for identification, was received in evidence as Petitioner's Exhibit No. 26.)

Q. (By Mr. Davidson): Did the corporation and the partnership make separate reports of their payrolls for the purpose of employment taxes?

The Court: When?

Q. (By Mr. Davidson): For the year 1941?

A. Yes.

Q. And for subsequent years? A. Yes.

Q. Were any of the operating personnel of the partnership carried on the payroll of the corporation? [32]

(Testimony of Louis C. Scharpf.)

A. Mr. Rogers and I were on the payroll in 1941, of the corporation.

Q. What was your salary?

A. Fifty dollars a month.

Q. Each? A. Yes; Mr. Rogers and I.

Q. Did the corporation have any other employees? A. No.

Q. At any time? A. No.

Q. From 1941 to 1944? A. No.

(The document referred to was marked as Petitioner's Exhibit No. 27 for identification.)

Q. (By Mr. Davidson): I hand you a document which has been marked for identification as Petitioner's 27 (hands document to witness); will you tell me what that is?

A. That is the 1942 and 1943 tax receipt from Lane County for the Twin Oaks Builders Supply Company, the partnership, personal property.

Q. What did this tax receipt cover?

A. That would cover the stock of merchandise.

Mr. Davidson: I will offer that.

Mr. Pigg: No objection. [33]

The Court: It will be admitted as Petitioner's 27.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 27 for identification, was received in evidence as Petitioner's Exhibit No. 27.)

Mr. Davidson: I would like to have this marked, also. (Indicating document.)

The Clerk: Petitioner's 28 for identification.

(Testimony of Louis C. Scharpf.)

(The document referred to was marked as Petitioner's Exhibit No. 28 for identification.)

Q. (By Mr. Davidson): I hand you a document which has been marked for identification as Petitioner's 28 (hands document to witness). Can you tell me what that is?

A. Well, this is an average demurrage agreement.

The Court: A what?

The Witness: An average demurrage agreement; demurrage for freight cars issued by the S. P. & S. Railroad Company.

The Court: Under what date?

The Witness: It is dated April 22, 1942.

Q. (By Mr. Davidson): In whose name?

A. It was to be effective in 1941.

Q. In whose name?

A. It was signed by the Twin Oaks Builders Supply [34] Company, L. C. Scharpf, partner.

Mr. Davidson: I will offer that.

Mr. Pigg: No objection.

The Court: It will be admitted and received in evidence and marked as Petitioner's 28.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 28, for identification, was received in evidence as Petitioner's Exhibit No. 28.)

Mr. Davidson: Your Honor, we have a Mr. Sweet, whose family lives some distance from here, and he is very much concerned with the flood, and

(Testimony of Louis C. Scharpf.)

Respondent's counsel has indicated he has no objection to my putting him on out of order, at this time, in order to accommodate Mr. Sweet.

Mr. Pigg: No objection.

Mr. Davidson: Mr. Scharpf, will you leave the stand for a few moments, while Mr. Sweet testifies?

The Witness: Surely.

(Witness excused.)

Mr. Davidson: Mr. Sweet.

Whereupon,

C. B. SWEET

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

[35]

By Mr. Davidson:

Q. Will you state your name?

A. C. B. Sweet.

Q. What is your business or occupation?

A. I am division manager for the Long-Bell Lumber Company.

Q. What particular division is under your charge? A. The retail department.

Q. How long have you been with the Long-Bell Lumber Company? Approximately 26 years.

Q. And in what departments?

A. 24 years in the retail department.

Q. Does the Long-Bell Lumber Company oper-

(Testimony of C. B. Sweet.)

ate retail lumber yards in Oregon? A. Yes.

Q. And does the Long-Bell Lumber Company operate a retail lumber yard in Eugene, Oregon?

A. Yes.

Q. And where is that yard located with reference to the yard of the Twin Oaks Builders Supply Company?

A. It is on the adjoining plot on High Street.

Q. What would you say as to how the Long-Bell yard compares in rental value with the Twin Oaks yard?

A. I would say they are very comparable. [36]

Q. And does the Long-Bell Lumber Company own that yard? A. Not the real estate, No sir.

Q. Does it rent the real estate?

A. It leases it.

Q. When was that lease entered into.

A. Oh, as near as I can remember, it was about 1944; possibly 1943; but I am not just sure about that.

Q. 1943 or 1944? A. Yes.

Q. What is the amount of the rental provided for in that lease? A. \$300.

Q. Per month? A. Yes.

Q. Who pays the taxes on the property?

A. The owner.

Q. Who pays the insurance on the property?

A. The owner.

Q. Who maintains the buildings?

A. The owner maintains the foundations, and

(Testimony of C. B. Sweet.)

we maintain the balance of it, other than the painting. The owner paints the building.

Q. Have you had any experience, Mr. Sweet, in the purchase of inventory of a going retail yard?

A. Yes.

Q. And did you so purchase the yard which you operate in Eugene? A. Yes.

Q. Will you state upon what basis such inventory is usually purchased?

A. We normally purchase it on the basis of cost or market, whichever is the lower.

Q. Is that the manner of inventorying in the retail yard? A. Yes.

Q. And did you inventory the Eugene yard that you purchased that way? A. Yes.

Mr. Davidson: You may cross examine.

The Court: Did the witness testify to the rental in this particular case?

Mr. Davidson: He testified, Your Honor, that the Twin Oaks Builders Supply Company yard was comparable in rental value to that which the Long-Bell Lumber Company occupies. He testified he is not an expert on rental, but that the property which he has rented was at \$300 a month.

The Court: And they are about the same.

Mr. Davidson: That is right.

The Court: You may cross examine. [38]

Cross-Examination

By Mr. Pigg:

(Testimony of C. B. Sweet.)

Q. Where is this lumber yard of the Long-Bell Lumber Company? In Eugene?

A. Where is it?

Q. Yes.

A. It is on High Street, 555 High Street; it is in the next block from the Twin Oaks Yard.

Q. What is the size of it in terms of square feet or lots, and so forth?

A. Of the Long-Bell Lumber Company yard?

Q. Yes; and as compared with the Twin Oak yard.

A. Well, I don't know how many lots are involved. It is a rather irregular piece of ground and runs a block in one direction, but it is very shallow in depth, rather pie shape; it is narrower at one end than at the other.

Q. You are referring to the Long-Bell property?

A. Yes.

Q. Do you know how many lots were involved or were owned by the Twin Oaks Builders Supply Company on January 1, 1941?

A. I have not the foggiest idea.

Q. Do you know the size and type of the buildings that were on there in January of 1941?

A. No; I had seen them, but I had paid no particular [39] attention to them; we were not in Eugene at that time.

Q. Had you in 1941, or at any other time, made any examination of the Twin Oaks Builders Supply Company for the purpose of comparing that prop-

(Testimony of C. B. Sweet.)

erty with the properties that you have described as belonging to the Long-Bell Company?

A. No sir.

Q. For the purposes of rental or otherwise?

A. No sir.

Q. Do you have any information or knowledge as to what the fair market value of the properties, —rental of the properties of real estate that belonged to the Twin Oaks Builders Supply Company in 1941, was? A. No, sir.

Q. Do you have any idea what the fair market value or rental value of the property was at that time? A. No sir.

Q. Did the Twin Oaks Company own any of the buildings or own all of the buildings, such as lumber sheds and facilities in 1941, in January, in Cottage Grove?

A. I would not have any idea what their holdings were.

Q. Does Long-Bell? A. Long-Bell?

Q. Yes. A. No sir.

Q. Don't they own certain facilities or buildings in [40] Junction City? A. No sir.

Q. And have not done so? A. No sir.

Q. So your testimony is to the effect that the rental values compare favorably, as a wild guess, or the best guess you can make?

A. Well, a man can look at two pieces of property while he is going down the street, and get some idea of their relative value.

(Testimony of C. B. Sweet.)

Q. Is that the basis on which you testified as to the value? A. Yes.

Mr. Pigg: That's all.

Redirect Examination

By Mr. Davidson:

Q. What are the terms of your lease?

A. Five years with an option.

Q. The lease is for five years at \$300 a month, with an option of another five years at \$300?

A. Yes.

Q. Was there an operating lumber yard when you took it over? A. Yes.

Q. Was it equipped for a lumber yard? [41]

A. Yes; it had been operating.

Q. Is it true, with some variations, that lumber yards, retail lumber yards, have considerable similarity?

A. Yes, I think most of them are somewhat alike; from the nature of the business they have to be.

Q. From the standpoint of your experience as a retail lumber yard operator, do you say, from a rental standpoint, a useful value standpoint for a retail lumber yard, that the property that you have under lease, and that which the Twin Oaks Company occupies are fairly comparable?

Mr. Pigg: I object to that on the grounds that it calls for a conclusion: no proper foundation laid.

(Testimony of C. B. Sweet.)

The Court: I think he has testified that. I think it is repetitious.

Mr. Davidson: Well, I wanted to emphasize it, Your Honor, that Mr. Sweet has had considerable experience so far as retail lumber yards are concerned.

The Court: Let us have the question.

(The pending question was read by the reporter, as follows:

“Question: From the standpoint of your experience as a retail lumber yard operator, do you say, from a rental standpoint, a useful value standpoint for a retail lumber yard, that the property that you have under lease, and that which the Twin Oaks Company occupies are fairly comparable?”) [42]

The Court: What is the answer to the question?

The Witness: Yes, I would say that I believe they are comparable.

Mr. Davidson: That is all.

Recross-Examination

By Mr. Pigg:

Q. Is your answer to the last question based upon the same considerations as the answer that you gave me on cross-examination, to which I directed your attention a while ago?

A. Yes, I think it is; I had no way of knowing exactly what they owned or did not own; I could only see what was being operated, and what they had to operate with.

(Testimony of C. B. Sweet.)

Mr. Pigg: That's all.

Mr. Davidson: That's all.

The Court: You may stand aside.

(Witness excused.)

The Court: We will take a ten minute recess.

(Whereupon a ten minute recess was taken.)

Mr. Davidson: I will recall Mr. Scharpf.

Whereupon,

LOUIS C. SCHARPF

recalled as a witness for and on behalf of the Petitioner, having been previously duly sworn, was further examined and testified as follows:

Further Direct Examination [43]

The Court: I don't know whether the witness has testified as to the date of his marriage, I don't suppose there is any question of community property involved.

Mr. Pigg: No question of community property is involved.

Q. (By Mr. Davidson): You testified why you wanted to operate the partnership, did you not?

A. Yes, I think so.

Q. Is there any other reason, which you have not given, as to why you wanted the partnership?

A. Yes, I had a definite reason; I wanted to get myself in a position, through a partnership, so that if I wanted to get out or dissolve it, I could get out.

Q. Mr. Scharpf, are you familiar with the prop-

(Testimony of Louis C. Scharpf.)

erty occupied by the Long-Bell Lumber Company at Eugene? A. Yes.

Q. What would you say, approximately, as to the area of that property, and how it compares with the area of the property occupied by the Twin Oaks Builders Supply Company—which they occupied in 1941?

A. Well, in 1941, we didn't own the same—
The Court: Speak louder.

The Witness: In 1941, we did not own that lot that divides our lumber shed from the warehouse; there was a big [44] two-story house in between. But, in frontage, it would be eighty and—we had, maybe, about 150 or 160 foot frontage on High Street. The Long-Bell property is an entire block.

Q. (By Mr. Davidson): How large is that?

A. I don't know.

Q. Greater than yours? A. Oh, yes.

Q. And, in general, how would the value of the improvements of the two properties compare, that is, yours in 1941 and theirs in 1943 and 1944 when they occupied them?

A. They had a shed over the entire block, the entire length. We had a warehouse on one side, and the lumbershed on the other side. But I would say the value was rather comparable.

The Court: I didn't hear what you said.

The Witness: The value was rather comparable.

(Testimony of Louis C. Scharpf.)

The Court: Was the size about the same? Was the size the same, the facilities, and so forth?

The Witness: As to location, I would say one was about as valuable as the other; we both used the same track; we have a track in back there that we both use.

Mr. Davidson: You may cross-examine.

Cross-Examination

By Mr. Pigg:

Q. Mr. Scharpf, did you say that the name of the [45] Petitioner corporation was changed from Twin Oaks Lumber Company to Twin Oaks Builders Supply Company, as a corporation?

A. Yes.

Q. When was that, Mr. Scharpf? About when?

A. It was, oh, about 1930.

Q. Wasn't it about 1935?

A. As to the exact year, I couldn't remember about that. It was at the time we took the agency for the Roebling Wire Rope; we had to take the name "lumber" out in order to get that agency.

Q. As I understand your testimony, the name of the Petitioner corporation has changed from Twin Oaks Builders Supply Company to the Twin Oaks Company, on or shortly after January 1, 1941?

A. That is right.

Q. I hand you Petitioner's Exhibit 8, which is a copy of the minutes of a special meeting of the stockholders of the Twin Oaks Builders Supply Company, held on January 2, 1941, the minutes be-

(Testimony of Louis C. Scharpf.)

ing signed John J. Rogers, President, and attested by L. C. Scharpf, Secretary. Is that your signature (indicating)? A. Yes.

Q. And Mr. Rogers was President?

A. Yes.

Q. And you were Secretary?

A. That is right. [46]

Q. Is this the meeting at which the change in the name of the corporation was made from Twin Oaks Builders Supply Company to Twin Oaks Company? Is that the time when the change was authorized?

A. Yes. The resolution right here (indicating).

Q. It so states there? A. Yes.

Q. And that was part and parcel of the general plan and the arrangements that were made at the time that the corporation turn over its name to the partnership, and that the partnership continue in the name of the Twin Oaks Builders Supply Company?

A. We wanted to keep that name for the partnership; we had been operating in that name.

Q. Why did you want to keep it for the operating end of the business?

A. Because all the customers were familiar with it.

Q. In other words, you had operated with a corporation of the same name, and had been engaged in the same business in the same community, in the same area, for a period of years, and you

(Testimony of Louis C. Scharpf.)

wanted to retain the customers who were familiar with that business? A. That is right.

Q. And they knew both Mr. Rogers and yourself, and your connection with the corporation prior to January 1, 1941 [47] didn't they?

A. Yes.

Q. Referring to Petitioner's 15, Mr. Scharpf, is that the partnership agreement executed January 25, 1941, as of January 1, 1941, is that right (hands document to witness)?

A. That is right.

Q. It was signed by several persons, including yourself, as Louis C. Scharpf, was it not?

A. Yes.

Q. And it was *signed* Mr. Rogers?

A. Yes.

Q. It was signed by all of you, by you, Mr. Rogers, Mrs. Rogers and Mrs. Scharpf.

A. That is right.

Q. And the business organization as contemplated by this exhibit 15—what was the organization which you testified it was desired to retain the name of?

A. I don't know that I understand your question.

Q. The name of the business organization which it was contemplated would subsequently carry on the business of the corporation—you wanted that name to still be the name "Twin Oaks Builders Supply Company"?

(Testimony of Louis C. Scharpf.)

A. That was the assumed name. That was the name for the partnership.

Q. That was the name of the corporation prior to that? [48] A. Yes.

Q. And this is the same business organization that you just stated a while ago you desired to have the advantage of, so far as the name was concerned, which has been used by the old corporation for its future business operations, is that correct? A. Yes; that is right.

The Court: Did the witness answer?

The Witness: Yes; that is right.

The Court: Speak a little louder, please.

Q. (By Mr. Pigg): Referring to Petitioner's Exhibit 16, which is a supplement to the partnership agreement being Exhibit 15, which I showed you. That is signed by the same parties as the previous exhibit, is it not? A. Yes.

Q. And Petitioner's Exhibit 17, which is a lease, dated January 2, 1941, how was that signed?

A. That was signed by the Twin Oaks Company, a corporation, by John J. Rogers, President, and myself as secretary, and the Twin Oaks Builders Supply Company, partnership, by Louis C. Scharpf, Eva M. Scharpf, Corabelle N. Rogers and John J. Rogers, partners.

Q. Petitioner's Exhibit 22, Mr. Scharpf, which I hand you (hands document to witness) under the heading of "assets", [49] is that a list of the assets

(Testimony of Louis C. Scharpf.)

or items of property that were transferred from the corporation to the partnership at that time?

A. This is a list of the assets and a list of the liabilities.

Q. Those liabilities represent the liabilities as shown by the books of the corporation at that time, which were assumed by the partnership?

A. These are the accounts payable that we had for merchandise, \$16,271.55, which we assumed from the corporation.

Q. You agreed to pay that on behalf of the corporation? A. Yes.

Q. Opposite the names of John J. Rogers, Corabelle N. Rogers, Louis C. Scharpf and Eva M. Scharpf, the amount of \$2,000 appears with respect to each. What does that indicate, if you know.

A. That means the investment that we had made in the partnership.

Q. Why is that investment made?

A. It was in cash; it was a cash investment.

Q. Did you put \$2,000 in cash into the business at that time?

A. Well, I think that the corporation owed—not at that time all of that—which I turned in to pay for it, with a note. [50]

Q. You mean that the corporation owed you a note of \$2,000 or more at that time; is that what you mean?

A. No; they did not owe me \$2,000. As I remember it, it was two notes totaling about twelve

(Testimony of Louis C. Scharpf.)

or thirteen hundred dollars which the corporation owed me.

The Court: Speak a little louder. I cannot hear you when you let your voice fall.

Q. (By Mr. Pigg): I will withdraw Exhibit 22 and hand you Exhibit 17, Mr. Scharpf, and ask you if there appears on that exhibit the amounts to which you refer that were owing by the corporation to you on January 1, 1941, (hands document to witness)?

A. That shows the accrued salary.

Q. How much was that?

A. \$1,200; and dividends from the Twin Oaks Company, formerly the Twin Oaks Builders Supply Company, \$70.60 and cash that I borrowed from my son, \$729.40. That makes a total of \$2,000.

Q. In other words, the total of those amounts was regarded as the amount owing to you by the corporation?

A. Yes, \$1,200.

Q. \$1,200 represents the salary not drawn?

A. Yes.

Q. And the \$70.60 represents dividends that had been declared but not paid at that time? [51]

A. I suppose.

Q. And that seven hundred dollars and some represents what you said a while ago?

A. Yes. I borrowed that from my son.

Q. Now, a total of those three sums, that means the liability of the corporation to pay that indebt-

(Testimony of Louis C. Scharpf.)

edness to you—that was cancelled and written off the books at that time, was it not?

A. It is the same as a cash deal.

Q. Just answer my question. Is that what happened; that was written off the books of the corporation at that time, and it is thereafter described as a cash investment that you made in the partnership; is that right?

A. That is right.

Q. You were a party to this transaction, or to all of those transactions, were you not?

A. Yes.

Q. Insofar as the same Exhibit 17 purports to describe the information with respect to John J. Rogers, is the same thing true insofar as the cash investment of John J. Rogers in the partnership is concerned?

A. Only that he had a lot more dividends than I had.

Q. I mean to the extend of the \$2,000; was that written off the books of the corporation?

A. He had \$1,200 salary and a dividend of \$944, which [52] came to more than \$2,000.

Q. It was \$2,000, or whatever amount that was owing by the corporation to Mr. Rogers, which was written off the books of the corporation in like manner as you have explained with respect to yourself; isn't that right?

A. Yes.

Q. And Corabelle N. Rogers, whose name appears on Exhibit 17—there are two sums there,

(Testimony of Louis C. Scharpf.)

one of \$1,500 and one of \$500; what do they represent?

A. The \$1,500 represents a note that the Twin Oaks people, the old Twin Oaks Builders Supply owed her.

Q. And what does the \$500 item represent?

A. I don't know; it must be some money that she had borrowed from somebody; it says it was borrowed on a note.

Q. So far as the \$1,500 item is concerned, was that item written off the books of the corporation or cancelled insofar as it represented a liability of the corporation, in like manner and for the same reason that you explained a while ago?

A. Yes.

Q. Did or did not Mrs. Rogers actually put \$500 into the business of the partnership at that time?

A. Yes.

Q. You are sure of that?

A. Yes.

Q. And the name of Eva M. Scharpf, insofar the similar [53] information is shown with respect to the items \$873.40 and \$1,126.60 are concerned, what do they represent?

A. The \$873.40 represents the 1940 dividend which was cancelled—a liability—and the \$1,126.60 was cash that she turned in, that she borrowed from her son Bill.

Q. That was borrowed from the son Bill when?

A. Prior to this.

Q. She borrowed it from your son Bill at some

(Testimony of Louis C. Scharpf.)

time prior to the date, and then loaned it to the corporation?

A. No; she borrowed it from Bill.

Q. For what?

A. To pay the balance of the \$2,000.

Q. You mean by that, that Mrs. Eva M. Scharpf put \$1,126.60 into the partnership business at that time?

A. Yes.

Q. Are you sure of that?

A. Yes.

Q. Now, as I understand your testimony with respect to that exhibit, except for the \$500 item as to Corabelle N. Rogers and \$1,126.60 for Eva N. Scharpf, the balance of the material on there merely represents a cancellation of indebtedness as appears on the books of the corporation owing to the persons named on the exhibit?

A. No; you left out the \$729.40 that I paid in that I borrowed. [54]

Q. That also represents money that you paid in?

A. Yes, and which I borrowed from my son.

Q. Aggregating, again, \$729.40? What is your answer?

A. Well, the answer would be that the accrued salaries and dividends were cancelled as shown on this statement, were cancelled as a liability of the corporation and shown as capital on the partnership.

Q. And the fact is that those items do not actually represent amounts of cash paid into the

(Testimony of Louis C. Scharpf.)

partnership by the persons whose names appear on the exhibits; is that right?

A. If you mean writing out a check, that is right; it is the same as cash.

Q. Let us turn over to Exhibit 22. What is this item of \$89,378.35 which appears under the heading of "liabilities"? Can you tell me, if you know?

A. That is a note that the Twin Oaks Builders Supply Company gave to the Twin Oaks Company for the merchandise that we had bought, and the books of account, and the notes receivable, bills receivable, and so on.

Q. I hand you Exhibit No. 11, so that you will have in your hand both Exhibits 11 and 12, and I will ask you whether in Exhibit 11 that is the note to which you have just referred?

A. It is the note, and for the same amount.

Q. If I understand you correctly, the effect of your testimony is that the amount of the note, \$89,000 odd, represents [55] the difference between the total of the assets, \$113,649.90 and the accounts receivable item of \$16,291.55 and the four items of \$2,000 each, or \$8,000?

A. That makes a total of \$113,649.90.

Q. In other words, the \$16,000 plus the \$8,000, added to the \$89,000 dollars, in round numbers, equals the total of the liabilities of \$113,000?

A. The total of the assets.

Q. The total of the assets?

A. Yes.

Q. Now, these same assets that are listed on

(Testimony of Louis C. Scharpf.)

this exhibit are the same assets that were agreed to be transferred to the partnership under the partnership agreement; is that correct?

A. Yes.

Q. There were no other assets or properties transferred at that time, or agreed to be transferred at that time, were there?

A. Not that I know of; no sir.

Q. So that the corporation retained only whatever real properties, improved real properties, or to the extent that they were improved, at Eugene and Cottage Grove and Junction City, and then the furniture and fixtures and the facilities that were used or being used in the business?

A. It was all the assets with the exception of real [56] estate and furniture and fixtures.

Q. At those three places? A. Yes.

Q. And it was what was left that was covered by the lease agreement, in Exhibit 17; is that correct? A. That's right.

Q. Prior to January 1, 1941, had the Twin Oaks Builders Supply Company been engaged in the rental of real estate—in the business of renting real property? A. No, sir.

Q. After January 1, 1941, that was the only business in which it was engaged, isn't that right?

A. We are in the building supply business.

Q. I am speaking about the corporation. Except for the change in name on January 1, 1941, or as of that time, the only business in which the

(Testimony of Louis C. Scharpf.)

corporation was engaged after January 1, 1941, was the renting of this real property and business facilities thereon to the partnership?

A. No. Prior to January 1, 1941, the corporation was operating a builders supply business.

Mr. Pigg: Will you read the question to the witness, please?

(Whereupon the last question was read aloud by the reporter as above recorded.) [57]

Q. (By Mr. Pigg): Now, will you answer the question?

A. After January 1, 1941, that was all the business activity.

Q. Mr. Scharpf, you are familiar, I assume, with all the exhibits that have been placed in evidence in this case?

A. I think so; I couldn't say that I know about all of them, but I think so.

Q. Do you know that copies of the minutes of the stockholders meetings, copies of the minutes of the directors meetings, on or about January 2, 1941, were placed in evidence by agreement, don't you know that? A. Yes.

Q. Insofar as those exhibits refer to L. C. Scharpf or Louis Scharpf, and indicate your presence at those meetings, or where your signature is on the document, you are the person to whom they refer? A. Yes.

Mr. Pigg: I will ask that they be marked for identification as Respondent's A the corporation

(Testimony of Louis C. Scharpf.)

income declared value excess profits and defense tax return of the Twin Oaks Builders Supply Company for the year 1940.

The Court: It will be marked for identification as Respondent's A.

(The document referred to was marked as Respondent's Exhibit A for identification.)

Q. (By Mr. Pigg): As I understand your testimony at the outset of this hearing, insofar as it related to your reason to organize the partnership, it was that you were dissatisfied because you did not have a stock interest of fifty per cent, or equal to that of Mr. Rogers? That was about it?

A. Yes.

Q. At that time—I am referring to January 1, 1941—the stock outstanding represented about 946 shares—did it not? A. That is right.

Q. Mr. Scharpf, I hand you Petitioner's 18 and I will ask you if that correctly reflects or shows the stock holdings of the Petitioner corporation on January 1, 1941 (hands document to witness)? A. It does.

Q. So that you then held thirty-five and three-tenths shares? A. That is right.

Q. And Mrs. Rogers—Mrs. Scharpf, your wife, owned or held 437.7 shares? A. That's right.

Q. A total of 473 shares?

A. That's right.

Q. And Mr. Rogers owned or held the remain-

(Testimony of Louis C. Scharpf.)

ing fifty per cent, or the remaining 473 shares? [59]

A. That is right.

Q. Prior to January 1, 1941, did you hold a proxy for the purpose of voting the stock issued or standing in the name of Mrs. Scharpf?

A. I don't ever remember of holding a proxy.

Q. Prior to January 1, 1941, did the stockholders of the Petitioner corporation hold any stockholders meetings? A. Yes.

Q. For the purpose of declaring dividends or transacting other corporate business?

A. Yes, as shown in the minute books.

Q. Who attended those meetings?

A. There was usually Mrs. Scharpf, Mr. Rogers, myself, and Mr. E. R. Bryson.

Q. And who was Mr. Bryson?

A. He was a stockholder in there to make the third director.

Q. He was merely a nominal stockholder in there holding two shares? A. Yes.

Q. Two shares, which, in reality, belonged to Mrs. Scharpf?

A. Yes, and one to Mr. Rogers.

Q. He held the legal title and Mrs. Scharpf held the equitable title? [60]

A. That is right.

Q. Or the rights or whatever accrued under the stock? A. That is right.

Q. At your stockholders meetings, who voted the stock that was then outstanding in Mrs. Scharpf's name?

(Testimony of Louis C. Scharpf.)

A. Mrs. Scharpf voted her own.

Q. You mean that Mrs. Scharpf at all times voted the stock that stood in her name, prior to January 1, 1941? A. Yes.

Q. Did you and Mrs. Scharpf ever disagree prior to that time on how her stock should be voted, on any question that arose? A. No.

Q. So far as the rights that existed under the ownership of the stock she held, what is the fact as to whether or not Mrs. Scharpf voted the stock in accordance with your wishes or in accordance with your recommendations and ideas? Do you understand the question?

A. What was the question?

Mr. Pigg: Will you read the question?

(Whereupon the last question was read aloud by the reporter as above recorded.)

A. Well, it might be that—I may be dumb, but I don't know exactly what you mean.

The Court: Speak a little louder. [61]

A. I don't understand the question.

Mr. Pigg: I will change the question and re-frame it.

The Court: All right.

Q. (By Mr. Pigg): Did Mrs. Scharpf ever vote the stock contrary to your wishes?

A. No.

Q. Isn't it a fact, Mr. Scharpf, that prior to January 1, 1941, the business of the corporation was carried on, insofar as its affairs were con-

(Testimony of Louis C. Scharpf.)

cerned, by you and Mr. Rogers as though you were equal stockholders?

A. Well, it was just carried on in the ordinary course of a corporation's business; there was no equal stockholders there.

Q. You never had any quarrels or misunderstandings with Mr. Rogers as to the management of the business?

A. We had lots of them, but we generally ironed them out.

Q. You never had any that you didn't compose to your mutual satisfaction, did you?

A. That's right.

Q. You never had any such misunderstandings or disagreements, other than those which normally, in the course of operating a corporation's business, would arise with respect to [62] differences of opinion which might exist between the officers of a company; is that right?

A. I would say that is right.

Q. I hand you Exhibit A, or Respondent's Exhibit A for identification, Mr. Scharpf, and I will ask you if it is not, in fact, the return of the Petitioner corporation for the year 1940?

A. It appears to be.

Q. I will ask you if it does not bear your signature at the bottom?

A. Yes, it carried my signature.

Q. It carries your signature on the front page, does it not? A. Yes.

(Testimony of Louis C. Scharpf.)

Q. On page three of this same return, same exhibit, under schedule F, under the caption "Compensation of Officers", does that not indicate that you and Mr. Rogers each hold fifty per cent, or each held at that time, fifty per cent of the then outstanding capital stock of the Petitioner corporation?

A. No, I wouldn't say so. It says, time devoted to the business; we both devoted our entire time to the business.

Q. That is under the caption of "Time devoted to Business"? There is another caption "Percentage of Corporation Stock Owned."?

A. Yes. [63]

Q. And that is divided into a subheading underneath the general heading?

The Court: Is there any answer to that question?

Mr. Pigg: What is that?

The Court: The question that you asked?

Mr. Pigg: That is my next step, Your Honor.

Q. (By Mr. Pigg): Turning your attention to the column, and particularly referring to the number 4. That means common stock, does it not?

A. I presume so.

Q. It shows John J. Rogers owned fifty per cent and L. C. Scharpf owned fifty per cent, does it not?

A. That is wrong.

Q. Although that might not be correct insofar as the actual ownership of the stock was con-

(Testimony of Louis C. Scharpf.)

cerned, it represented, in general, the equal division of responsibilities in the conduct of the business between you and Mr. Rogers, did it not?

A. I would say that is just a typographical error.

Q. How long had Mr. Rogers been president of the Petitioner corporation prior to January 1, 1941?

A. Why, he came into the corporation in May of 1928.

Q. And he had been president all during that time?

A. That is right. [64]

Q. You were secretary-treasurer of the corporation at the end of 1940, were you not?

A. Yes.

Q. How long have you held that office?

A. Since 1926 to the present time.

Q. And during the period which Mr. Rogers was president of the corporation, what were his duties or functions or responsibilities as president?

A. Mr. Rogers purchased the lumber and shingles and molding and coal, principally, and I looked after the——

Q. Just what Mr. Rogers did, as completely as you can tell me, first?

A. Well, as I said, he purchased the lumber, shingles, molding, coal, and he looked after the granting of credit and the collection of the accounts.

Q. Now, the same question as concerns your—

(Testimony of Louis C. Scharpf.)

self. I am speaking as of before January 1, 1941.

A. Well, I looked after the sales and bought all the other building materials items.

Q. So that you each had a more less definite classification of duties and responsibilities to perform for the corporation?

A. That is about the way we tried to divide it up.

Q. Well, now, after the execution of the partnership agreement, on January, 1941, what were the duties that were [65] performed by Mr. Rogers on behalf of the partnership?

A. They were buying the lumber, shingles, lath, and looking after the credit, and collecting accounts.

Q. In other words, the same as before?

A. Yes.

Q. Were your own duties, so far as they pertained to the carrying on of the business, the same after that as they had been before?

A. Yes; looking after the sales and buying all the rest of the merchandise.

Q. Was a complete new set of books opened as of January 1, 1941, Mr. Scharpf, if you know?

A. Yes.

Q. What was the difference in the designation of the business organization?

A. What do you mean?

Q. What symbols were there on those books to show that it was a corporation as distinguished

(Testimony of Louis C. Scharpf.)

from a partnership, or, rather, a partnership as distinguished from a corporation?

A. The partnership was the Twin Oaks Builders Supply, and the corporation was the Twin Oaks Company.

Q. On December 31, the corporation was also the Twin Oaks Builders Supply Company, wasn't it?

A. Yes.

Q. In fact, it was also the Twin Oaks Builders Supply [66] Company on January 1, 1941?

A. Yes.

Q. Do you know the exact date the name was changed to the Twin Oaks Company?

A. Well, it was changed, I suppose, the second day of January, the first day after the legal holiday.

Q. That is the date of the stockholders resolution, but wasn't there something that had happened so far as the Corporation Commissioner of the State of Oregon was concerned, to carry the resolution into effect?

A. I think that was all taken care of.

Q. You mean it was all taken care of, those formalities, sometime prior to January 25, 1941?

A. Yes, that is right; we had that all settled.

Q. And January 25, 1941, was the date of the execution of the partnership agreement?

A. That is right.

Q. When did you first change your letterhead and bills and billheads, and so forth, to show that

(Testimony of Louis C. Scharpf.)

it was a partnership and not a corporation, if ever?

A. Well, I couldn't say as to that, except that we used up some of the old checks and some of the old stationery, instead of throwing it away, and when it ran out we ordered new.

The Court: I am sorry, I did not hear the last answer. [67]

The Witness: I said I didn't know exactly whether we ordered new stationery and checks and tickets like you mentioned, except I know that we used up some of the old sales tickets and checks instead of just throwing them away; we used them up as a matter of economy.

Mr. Pigg: Will counsel stipulate that the name of the Petitioner corporation was formally changed by appropriate action with the Corporation Commissioner of the State of Oregon on January 15, 1941?

The Court: Is that stipulated and agreed to between the parties?

Mr. Davidson: Yes. It is so stipulated.

The Court: Very well.

Q. (By Mr. Pigg): What was the difference, if any, in the wording that appeared on the letterheads after they were first ordered, or orders for new letterheads that were made after January 1, 1941? Do you know?

A. I don't think there would be any difference.

Q. Is that true also as to any bills, that is, the

(Testimony of Louis C. Scharpf.)

bills which were sent to the customers, and so forth?

A. I see no reason why they would be changed.

Q. So far as the customers of the corporation were concerned, they were still doing business with the same company, so far as you know? [68]

A. I don't think the customer pays any attention to who they are dealing with, whether it is a corporation or a partnership.

Q. After January 1, 1941, you still retained the same customers you had before that?

A. That's right.

Q. So far as those customers were concerned, so far as you knew and so far as you were aware, and so far as they were aware, according to your knowledge, they were dealing with the same business organization that they had always dealt with; isn't that a fact?

A. I don't know what they thought.

Q. What action did you ever take to put the customers on notice that that they were no longer dealing with the same business organization that they had formerly dealt with?

A. They were not given any notice, so far as the customers were concerned.

Q. You just let nature take its course, so far as that was concerned? A. Sure.

Q. Were there any meetings held prior to January 1, 1941, as which there was discussed the matter that led to the formation of the partnership,

(Testimony of Louis C. Scharpf.)

other than the stockholders minutes, which are already in evidence, reflect?

A. Well, I don't know of any other meetings unless [69] there would be an informal discussion between the interested parties.

Q. Did you ever discuss with anyone the subject of tax advantages that would accrue from the formation of the partnership?

A. No; I never thought of it.

Q. I beg your pardon? A. I did not.

Q. Is it your testimony here that you never discussed that with anyone prior to January 1, 1941?

A. That is right; all I was interested in was getting the partnership.

Q. You never discussed with anyone whomsoever the question of the tax advantage that might accrue from the creation of the partnership; is that your testimony?

A. I don't remember anything on that part.

Q. Do you know an accountant in Eugene, Oregon by the name of Mr. Collins? A. Yes.

Q. He is an accountant? A. Yes.

Q. He was your accountant?

A. Yes, he is our accountant.

Q. How long has he been your accountant?

A. Well, I don't know; probably ten or twelve years. [70]

Q. Anyway, it was long prior to the date which we have been talking about here? A. Yes.

(Testimony of Louis C. Scharpf.)

Q. And Mr. Collins handles your tax matters?

A. Yes.

Q. And makes out your tax returns?

A. Yes, he has.

Q. And he has done it for you for many years?

A. Yes.

Q. And is it your testimony that you never discussed with Mr. Collins prior to January 1, 1941, the subject of the tax aspect of the corporation and of the partnership?

A. Well, we naturally would talk about those things, about our earnings, that they were so small that there wasn't anything to figure on; it wasn't a thought at all, because our earnings were so small. It certainly wasn't anything that we figured on from a tax angle, whether we could save so much on this and so much on that. It wasn't anything like that.

Q. I hand you Petitioner's Exhibit 3, Mr. Scharpf, which has already been identified as the statement of the income accounts of the Twin Oaks Company for the years 1935 to 1940; is that correct? (Hands document to witness.)

A. That is right.

Q. And the last line at the bottom, and the figure on that line opposite "net income for the year", those figures, [71] as I understand it, are the figures that have been agreed to as the net income as shown by the books of the company for those years?

(Testimony of Louis C. Scharpf.)

A. Yes.

Q. The company had a net income, according to its books, of \$6,036.35 for 1940 and for 1939 its net income was \$2,215.38, and for the preceding four years it had a small loss of \$500 for 1938, and a smaller income for 1935, 1936 and 1937; is that correct?

A. That is right.

Q. So that the business of the company was showing an improvement by the close of the year 1940?

A. It happened to be one fair year; but it was a very small profit though.

Q. It is a fact, is it not, that the business conditions, and particularly the demand for lumber was such as to make the prospects or expectations for future business rather favorable at that time; isn't that a fact?

A. I don't think anybody could tell.

Q. What is the fact, so far as you are concerned, at that time, did you think that conditions had a portent for the worse or better?

A. I couldn't say; I had no way of prophesying that.

Q. You don't know; is that the sum and substance of your answer, that you don't know? [72]

A. As I say, I had no way of prophesying what the business would be in the future.

Q. Is it customary and usual that the officers of the corporation, at the close of any fiscal year, or at the close of the business year, survey the

(Testimony of Louis C. Scharpf.)

business results for the past year and try to anticipate the future business?

A. Well, they might talk about it, but there is no real prophesying that. These earnings and sales of these years are very comparable; there isn't much difference.

Q. Mr. Scharpf, I hand you Petitioner's Exhibit 5, which is the agreed statement of the income account of the Twin Oaks Builders Supply Company for the years 1941, 1942, 1943 and 1944; is that correct? A. Yes.

Q. Now, what is the fact as to whether the net income of the corporation increased to a very considerable extent, beginning with the year 1941?

A. Well, it did increase.

Q. Well, it went to \$29,000 in 1941, did it not?

A. Well, whatever the figures show.

Q. And it dropped to \$18,000 in 1942 and up to \$66,000 in 1944? A. That's right.

Q. As I understood your testimony, in addition for the first stated reason for wanting to organize the partnership, [73] you further stated that, as another reason, you wanted to get your business in such a shape that if you wanted to dispose of it and get out, you could do so; is that right? A. That's right.

Q. And you would be an independent agent?

A. You could do it as a partnership, and you could not do it as a corporation.

Q. Now, handing you Petitioner's Exhibit 15;

(Testimony of Louis C. Scharpf.)

which is the partnership agreement, I will ask you to point out or designate by paragraph number and page the provision of that agreement that you regard as being the contractual relationship that permitted you—or accomplished this particular purpose that you have mentioned (hands document to witness)?

A. You might say that this is covered on page three, the last paragraph.

Q. Just identify it by paragraph and page number; that is all I asked you to do. We can go into that later.

A. The last paragraph of page three.

Q. You regard that as being the provision of the agreement that would enable you to get out of the business at any time that you saw fit, to a better advantage than if you had a corporation?

A. It is one way.

Q. It is one way. What other way?

A. As I understand it, any partner can do that any time [74] they want to, in a partnership.

Q. Did you note and read over and consider the terms of that partnership agreement when you signed it at that time? A. Sure.

Q. Is there or is there not a provision in that partnership agreement that prohibits a partner from selling his partnership unless he offers it at the same time to the other stockholders, that is, his interest in stock in the corporation? He has to do that at the same time?

(Testimony of Louis C. Scharpf.)

A. That is in the contract.

Q. How do you reconcile that with the idea that this agreement would facilitate your ability, if you desired to wash your hands of it and get out of it?

A. Well, that was the active business that they were selling; the selling of the merchandise, and that was the most important end of the business. At that time when we went into it, and at the time the highway survey went through, I figured that the corporation would be gone a long time ago.

Q. Isn't it a fact that this matter of the business of the highway survey—I assume you are referring to the Highway Commission of the State of Oregon, when you are referring to the highway survey; is that right? A. Yes.

Q. And that was nothing more than general talk or gossip, at least up to as late as 1946? [75]

A. No; I should say not. They had the survey stakes right through our property, that was true in 1940.

Q. Were there any survey stakes anywhere in the vicinity where they were still contemplating a possibility of placing a road?

A. I noticed ones where they came out catty-corners across our building, and also took a part of the Kreml warehouse on the other side of the street.

Q. Do I understand correctly from your testimony, that on January 1, 1941, so far as you were concerned, you regarded the possibility of the con-

(Testimony of Louis C. Scharpf.)

demnation or the possibility of the taking of some of the property over by the Highway Commission a danger in the very near future?

A. That is right, the way I figured it.

Mr. Davidson: I hate to interrupt, but Mr. Bryson is here and he wants to get away tonight and I would like to ask whether you plan to recess at five o'clock.

Mr. Davidson: I would like to have an opportunity to put Mr. Bryson on, so that he will be able to get back to Eugene tonight.

The Court: Is there any objection to putting him on out of order?

Mr. Pigg: I regret that it takes so long on cross-examination, but these are factual matters and it takes a long time to develop them. [76]

The Court: Have you any objection to Mr. Bryson testifying at this time?

Mr. Pigg: No.

The Court: All right. We will let the witness stand aside.

(Witness excused.)

Mr. Davidson: Mr. Bryson.

Whereupon,

E. R. BRYSON

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

(Testimony of E. R. Bryson.)

Direct Examination

By Mr. Davidson:

Q. Will you state your name?

A. E. R. Bryson, Eugene, Oregon.

Q. What is your profession?

A. Attorney at Law.

Q. Where is your office? A. Eugene.

Q. Have you represented the Twin Oaks Builders Supply Company and the Twin Oaks Company in the past? A. Yes.

Q. For how long?

A. I think I organized the first company. [77]

Q. That was before 1926?

A. Well, I couldn't say that. It was a good while ago; it was around about that time.

Q. Mr. Scharpf testified that that was the time he came in?

A. When he and Mr. Rogers first got together in their enterprise, they came to me and I formed the corporation for them. That is my recollection. Of course, I have done a great deal of law business during that time and my memory is not too good as to the exact date. I have taken care of their law business, that is, matters connected with the corporation, and that sort of thing since the formation of the company. There were a lot of things in connection with the law business, such as collection, that I did not bother with.

Q. Were you consulted on or before January 1,

(Testimony of E. R. Bryson.)

1941, with reference to their formation of a partnership?

A. I don't think that I was consulted as an attorney in the matter. When they formed that corporation, they were strangers, and they came to Eugene about the same time; they came to me and wanted me to become a director of the corporation with the idea of acting as an arbitrator between them, and in some instances during that time I acted as such. I accepted that responsibility, but I really owned no stock in the corporation. I had a qualifying share, and I have been ever since a director. Now, they came to me several times on [78] matters that they were not wholly in agreement on, on matters that were not legal, things that you would not go to an attorney with, but on business matters. Mr. Rogers especially was inclined to do that.

Sometime during the year 1940,—I can't remember just what part of the year it was, but it was in the five or six months preceding the transaction that is the subject of this hearing,—Mr. Rogers came to me as many as three or four times for extended conferences, not so much legal, although he did ask me some question about the rights and responsibilities of partners, but practically all of his talks with me were with regard to the wisdom, from a business standpoint, of complying with the urgent request of Mr. Scharpf to take either all the properties out of the corporation, or at least the operating properties, that is, the properties that they did

(Testimony of E. R. Bryson.)

take over, and form a partnership to conduct the business operations; and I hardly think that I could say that they came to me for legal advice on those questions. Mr. Rogers came to me for business advice, more I would say, whether he ought to comply with Mr. Scharpf's request.

Q. What advice did you give him?

A. Well, I talked the situation over with him at considerable length. He told me that the reason Mr. Scharpf gave to him for wanting to have a partnership was,—this was afterwards verified by Mr. Scharpf himself at a joint meeting of the [79] three of us,—that he was working there very hard producing, and had a very small interest in the corporation, only a nominal interest, and didn't like that situation; that he wanted to have an owner's interest, as a substantial owner in the operation itself, and he figured he couldn't do that except by a partnership; and that was given as his reason.

Mr. Rogers expressed to me the fear that Mr. Scharpf was trying to get into a position legally where he might get his sons into the business,—expressing it in a rough sort of way,—to get Mr. Rogers out of the business. He talked about his age, and so forth and the fact that Mr. Scharpf had a couple of sons that were coming on, that were very fine young men, and Mr. Rogers was just afraid that, if he consented it might put Mr. Scharpf in a position where he could supplant him, you might

(Testimony of E. R. Bryson.)

say, in the business; not steal it from him, but on some fair terms for his sons. We talked that over at considerable length several times. I had the highest admiration for both of them. I told him that I didn't think Mr. Scharpf would ask anything of that sort from him that was not fair. I told him, on the other hand, that Scharpf had sons growing up, and if they wanted to get into the business, I didn't see how he could arbitrarily refuse to let him carry out the ambition,—on proper terms, of course. And eventually, at my suggestion, there was a joint meeting of the three of us. It was not a director's meeting, it was just consultation regarding the situation that [80] they were in, and Mr. Scharpf's urgent request that he consent to what Mr. Scharpf was wanting. At that time we talked rather frankly about his reasons for desiring this change in the organization. Again Mr. Scharpf stated that there he was working like a dog, and very effectively, and that the two of *the* together were making profits, and that all he was was a hired man of the corporation, and he didn't like to be in that position, and therefore he desired the formation of a partnership in which each of them, or in which he would have a fourth interest, with his wife having the other fourth, so that he would share in the profits as the business was built up, and he would have a share of the earnings and accumulations. I put the question to him about his sons, and he admitted that there was nothing that he would like better than

(Testimony of E. R. Bryson.)

to have his sons, or at least one of them eventually go into the business, but he expressed himself as not willing to force anything of that kind on Mr. Rogers, if Mr. Rogers did not feel it was fair. He called my attention to Mr. Rogers' fine sons.

Now, these men had the utmost confidence in each other; they got along fine in their business relations, and they have been successful, and they complimented each other in their business relations; and he said that if Mr. Rogers wanted his sons in the business, he certainly would consent to it without any difficulty.

I had told Mr. Rogers that he must not count on me [81] as an arbiter in such a dispute, or that he could expect me to decide with him arbitrarily. I told him that I thought he had a right, under proper terms and proper considerations, that is, Mr. Scharpf, to get his sons in there; and Mr. Rogers realized that. I also told him,—this was in connection with the discussion,—of the legal effect of the partnership as compared with a corporation, and that is he and Scharpf ever had an outright stalemate, I was not going to arbitrarily going to force any decision on either one of them, that I would simply resign; and that there simply would be a stalemate, and, if there was a partnership, as I viewed the law, that could eventually result in a receivership, and that it was hardly within his power, by any form of business organization, to compel Scharpf to stay in the business and operate

(Testimony of E. R. Bryson.)

it with him for the rest of Mr. Scharpf's life, or for the rest of his life.

Q. Did you advise him, except for Mr. Scharpf's insistence, that you would prefer the corporation?

A. Yes, I rather think I did. I had some hesitation; however, I eventually advised Mr. Rogers to consent to it, but I had some hesitation in doing it.

Q. Did you consider any tax angle of the matter?

A. No, it was never discussed. I am not a tax attorney; they never came to me with any of their tax problems. The problem that Mr. Rogers was very concerned about, and which was of the greater importance in his mind, and which was also [82] Mr. Scharpf's problem, was not so much the tax angle as it was the questions that were uppermost in the minds of either of them; on the part of Mr. Rogers, the question of his sons and also the question of certain liabilities in partnerships as compared with corporations, while Mr. Scharpf wanted to get into a partnership so that he would be an equal partner in the business.

Q. It is your memory that these discussions with Mr. Rogers, relating to Mr. Scharpf's association commenced five or six months before the consummation of the partnership?

A. It commenced a quite a while before; I couldn't say how long before, but I have an idea it was at least that long. I think that there were about four times that Mr. Rogers called me and said

(Testimony of E. R. Bryson.)

he wanted a conference with me. I think there were as many as four times before the one in which Mr. Scharpf participated.

Q. Did you discuss in this meeting the complete dissolution of the corporation?

A. I think there was some question as to whether the corporation should be dissolved and the property turned over to the stockholders, and the partnership formed amongst the individuals, or whether the corporation should merely turn over what you might call the operating property. That is my memory. It was probably at my suggestion that it was not necessary to dissolve the corporation, in order to put [83] the operating property into the partnership, that is, that the real property could be left with the corporation and the operating properties turned over to the partnership.

Q. Did Mr. Rogers insist that the corporation be not dissolved?

A. I won't say that. I will say that he hung back and was very hesitant and resistant to the idea in his own mind, afraid of it. I know that he telephoned to his brother about it.

Q. Who is his brother?

A. He has a brother in the east, in Minneapolis.

Q. Did you draw the partnership agreement for the Twin Oaks Builders Supply Company?

A. I did.

Q. We have in evidence now, Mr. Bryson, as Petitioner's Exhibit 15, a document that has been

(Testimony of E. R. Bryson.)

stipulated to as a copy of the partnership agreement (hands document to witness). Will you look at that briefly and say whether that is the agreement that you drew?

A. I couldn't say except by comparing it with the original, but I am satisfied from testimony that that is what it is.

Q. In that agreement, Mr. Bryson, there are certain provisions in relation to the duties of a withdrawing partner to make a buy or sell offer, and to include in that offer stock in the corporation, and also an option to purchase an [84] interest by a husband of his wife's interest in the partnership, in the event of her death, and an option, in the event of the husband's death that the other male partner, with his wife, may purchase it.

Q. Do you remember those provisions?

A. In a general way, I have not read it over since I wrote it. This was in 1941. I don't remember the details, but I remember there was such a provision in the contract.

Q. Will you tell us why those provisions were put in there?

A. The general provision for allowing the buy and sell offers for that sort of thing? Is that what you mean?

Q. Yes.

A. Well, there was quite,—that is quite a customary provision in a partnership agreement of that character, where there are certain properties in-

(Testimony of E. R. Bryson.)

volved and considerable operations. If you refer to the execution of the,—if you refer to the inclusion of the stock of the corporation, it seems to me only an ordinary business and proper business arrangement, for either partner to be able to take advantage of the opportunities offered by the contract and to purchase the property of the partnership, and at the same time, in a situation of this kind, to give him the opportunity to also purchase the stock of the corporation and not leave the corporation with some extensive properties without even an *opportunity* rent it [85] advantageously.

Q. Do you remember, Mr. Bryson, if you had previously drawn any agreement between Mr. Rogers and Mr. and Mrs. Scharpf relating to the stock of the corporation?

A. Yes, I had. That is an agreement, as I recall, providing for the purchase of the stock by the survivors in the event of death.

Mr. Davidson: I would like to have this document marked for identification.

(The document referred to was marked as Petitioner's Exhibit No. 29 for identification.)

Q. (By Mr. Davidson): I hand you herewith an agreement date May 31, 1938, marked for identification as Petitioner's 29, and ask you if that is the stock option agreement to which you referred? (Hands document to witness.)

A. Yes, it is.

Q. Did you draw that?

A. Yes, I did.

(Testimony of E. R. Bryson.)

Mr. Davidson: I would like to offer that in evidence.

Mr. Pigg: No objection.

The Court: It will be admitted and marked as Petitioner's 29.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 29 for identification, was received in evidence as Petitioner's Exhibit No. 29.) [86]

Q. (By Mr. Davidson): Is it correct, Mr. Bryson, in general, that the provisions relating to the options of the stock in a partnership interest, under the partnership agreement of January 2, 1941,—that those provisions were substantially the same as those included in the stock option agreement of 1938?

A. Of course, they will speak for themselves; it is my general recollection that they were substantially the same, and designed to carry out the same plan and design.

Q. You stated that your conferences prior to this general meeting when you came to this agreement, were with Mr. Rogers rather than Mr. Scharpf?

A. Yes, I had three or four conferences, or more, with Mr. Rogers, and they related to his objections to the partnership, the change in the arrangement, and finally I suggested to him that he ought to call Mr. Scharpf in and talk frankly about his objections. This we did, and we talked it over with Mr.

(Testimony of E. R. Bryson.)

Scharpf and Mr. Rogers then announced that generally he was not in favor of it, but that he would consent to it. I think it was that same night, or it might have been later. Then, of course, we discussed and agreed upon the terms of the partnership agreement; after that had been agreed upon, I put in some provisions as a protection to Mr. Rogers, to protect him against what he was afraid of.

Q. Did Mr. Rogers object to the formation of a partnership [87] as distinguished from a corporation?

A. Yes, he objected to it. He did not say arbitrarily that he wouldn't do it, but his arguments were against it, that he was afraid of it, and that he was very much opposed to the idea of any change.

Mr. Davidson: That is all, Mr. Bryson.

Cross-Examination

By Mr. Pigg:

Q. Mr. Bryson, as I understand your testimony, these conferences that you had with Mr. Bryson were of a non-confidential nature, so far as any conversations or advice that you gave Mr. Rogers or Mr. Scharpf?

A. I don't understand your question.

Q. They were non-confidential? There were no privileged communications?

A. No, I don't think so. They were not talking to me as a lawyer; they were talking to me as a man whom they had agreed to resolve their differ-

(Testimony of E. R. Bryson.)

ences, and how they could best solve them in a business way.

Q. Now, at the time of your first conversation, and the other conversations that you mentioned with Mr. Rogers, did you know anything about the number of shares in the stock of the company that Mr. Rogers held?

A. I couldn't tell you the number of shares, but I know Mr. Rogers held half of the stock and Mr. and Mrs. Scharpf [88] owned the rest of it. Mr. Scharpf owned only a nominal amount; I don't know the proportion. I probably did right when I drew the papers, but I had probably forgotten it a week after that.

Q. At the time you drew the papers, you knew Mr. Scharpf was secretary-treasurer of the corporation?

A. Yes.

Q. And was responsible for various phases in the conduct of its business, as he described them this afternoon?

A. He was responsible for performing the duties of secretary-treasurer of the corporation: is that what you mean?

Q. Were you present when he testified this afternoon?

A. Yes, but I couldn't hear his testimony very well. I sat over in the corner, in the open, where I couldn't hear very well.

Q. You heard his testimony as to the general

(Testimony of E. R. Bryson.)

scope of the affairs of the business, or the conduct of the business, and its background?

A. I didn't hear all of it; I think I could probably sense it.

Q. You knew the circumstances, in general, when he had the conversation that you referred to?

A. Well now, I knew this about it, that Mr. Rogers was an older man with a very large experience in large affairs, and a man who was apt to be a good deal better informed about [89] general economic conditions and better qualified to chart the financial and business course of the corporation that was Mr. Scharpf. On the other hand, Mr. Scharpf was extremely well liked in the community, very active and very energetic, a natural salesman, and they just complimented each other's work in that respect.

Q. As the holder of the qualifying shares of the corporation, you attended the stockholders meetings?

A. Yes; not all of them, perhaps, but whenever anything of any consequence was up, I attended.

Q. Where were the meeting held?

A. They were usually held in my office, I think.

Q. Did you know of any occasion at any time when Mrs. Scharpf voted her stock other than in accordance with Mr. Scharpf's wishes?

A. No, I don't remember of any such situation. If there was any dissension between them, I never heard of it.

(Testimony of E. R. Bryson.)

Q. So far as the possibility of Mr. Scharpf's stock being brought into the business, in the event of the formation of the partnership, did you discuss,—I mean the effect of such an arrangement,—did you discuss at all the effect of such an arrangement with Mr. Rogers, and the possibilities, or the possible equivalent of Mr. Rogers giving or transferring to the name of one of his sons a relative portion of his stock?

A. You mean of Mrs. Scharpf doing that? [90]

Q. Well, I may be confused. I'm sorry.

A. If I understand what you mean, I don't think so. I will tell you, while I pointed the ultimate end of actual strife and lawsuits, I never for a moment thought there would be any trouble between the two men; they were both such fine men that they would come to an agreement, and I think that I said, in my judgment, if I said something was fair, they would do it; I think that Mr. Rogers did consent to some things that he was at first very much opposed to, and he did so in my advice.

Q. You knew, as an attorney, that Mrs. Scharpf could have transferred or given to the same sons a percentage or a number of shares of stock in the corporation, and the sons could have had a voice in the corporation's business to the same extent that they might have in the partnership arrangement, didn't you? A. I don't think that is true.

Q. You don't think that is true?

A. No, I do not. She could transfer stock to

(Testimony of E. R. Bryson.)

one or both of her sons, and they could participate in meetings as all stockholders do, in general, in the corporation, but that didn't mean they would get into the business; that didn't mean that they would be taken into the business as employees or officers.

Q. Isn't it a fact that Mr. Rogers held fifty per cent of the stock in person, and Mr. and Mrs. Scharpf held fifty [91] per cent between them, with neither family in control of the corporation,—actual control.

A. Oh, there was a possible stalemate.

Q. There was a possible stalemate?

A. That is right.

Q. So that Mrs. Scharpf or Mr. Scharpf, so far as his full number of shares was concerned, could have given their shares of stock to the sons, or anyone else who they might see fit to give them to, couldn't they? A. Sure.

Q. And Mr. Rogers would have had nothing to say about it?

A. Not so far as the stock ownership was concerned.

Q. The corporation would have continued to exist right along unless and until the conditions got bad that it might result in a receivership under those circumstances?

A. That is a possibility.

Q. That is the picture so far as the corporation was concerned. Now, so far as the partnership was concerned, you knew, also, that it was impossible

(Testimony of E. R. Bryson.)

for Mr. Scharpf or Mrs. Scharpf, as partners, to bring in the son without the son the other partners don't you?

A. I don't know as I understand you.

Q. Well, it could not have been done by either one or the other attempting to bring in their sons without the consent [92] of the other partners?

A. That's right.

Q. And if they had attempted it, why that would, per se, dissolve the partnership?

A. Or, give a right of dissolution to the other partner.

Q. So, what did you think about Mr. Rogers' apprehensiveness so far as the sons were concerned, as to whether it was imaginary or whether it was fanciful?

A. Well, I thought it was quite possible that Mr. Scharpf a few years later, when his son got through with his education, that he might want him in the business. I told Mr. Rogers that, and that if he wanted him in he should take him in,—under the proper kind of arrangements, of course, not as manager or as a full partner. but in a position in the business as an employee, so that he could go into the business and eventually be able to come into it, perhaps.

Q. What reason was there, if you know why that same arrangement could not have been accomplished so far as the stock ownership of the corporation was concerned?

(Testimony of E. R. Bryson.)

A. I don't think you get this distinction. Mr. Rogers had the idea he would be in a better position against having that situation forced upon him under a corporation than he would under a partnership.

Q. You did not, as an attorney, attempt to explain or discuss these phases as to the legal aspects with Mr. Rogers? [93]

A. Oh, yes, I did, to some extent.

Q. Didn't you tell him the same things in which he expressed concern could happen in a corporation as well as in a partnership if not better?

A. I don't know if I understand your meaning.

Q. We will strike the question. Did you know, or did you discuss with Mr. Rogers the possibility that he anticipated, of the bringing of the sons into the business as possible partners, that, so far as the future of it was concerned, Mr. Scharpf could have, and his wife could have accomplished the same thing in the corporation?

A. That was a long time ago. I know I discussed the legal implications and the legal situation with Mr. Rogers; I would not be prepared to know and say what all the possibilities were that I discussed with him at that time, unless I would sit down for an hour and think of some of the things. But I think, in a general way, the Scharpfs could have brought about that situation, but from a practical situation, he could not have forced his son in there. However, I told Mr. Rogers that, if he wanted him to come in as an employee, under proper regulations, either

(Testimony of E. R. Bryson.)

if the corporation was continued, or under a partnership, he should allow him to come in. I told Mr. Rogers that I didn't think there was any possibility of Mr. Scharpf trying to force his sons in against his protest, if he insisted upon it; but I also told Mr. Rogers at the [94 & 95] same time that, if Mr. Scharpf wanted his sons in there and wanted them to grow up in the business, as employees, of course, and not as managers, that I thought Mr. Rogers should consent to it; and, on the other hand, I thought that if Mr. Rogers wanted any of his sons in there, Mr. Scharpf should consent to it. As it was, the situation worked out beautifully, but it was a real worry to Mr. Rogers at the time.

Q. But none the less, from Mr. Scharpf's standpoint, and that of his family, he would be in a better position to bring his sons into the business of the corporation than he was after the business was transferred to the partnership?

A. No; I think he was in a better position to bring his sons in after they were a partnership, than he was when they were a corporation.

Q. He would have had to have Mr. Rogers consent in that event, wouldn't he?

A. Well, the only way either one of them could bring his sons in against the protest of the other would be a threat of breaking the arrangement between them, and the partnership could be more easily broken up than the corporation.

Q. Now, as concerns Mr. Rogers, the hazards or

(Testimony of E. R. Bryson.)

the dangers that he might have anticipated in the event of bringing his sons into the business,—the partnership,—the partnership did not improve that situation, did it?

A. Mr. Rogers' situation? [96]

Q. Yes.

A. No, I don't think it did in that respect. But I convinced him I thought there was no danger, because his apprehensions, I thought, were unjustified. I think I convinced him that he could not afford to make an issue of this partnership request at this time, over something which might never become anything of any consequence, and, if it did come, it could be handled. I told him that I thought he could not afford to reject the urgent request of his partner, in wanting to have a share of the operating end of the business, because of the fear that his partner might at some time in the future try to force his sons into the business.

Q. Mr. Bryson, as already shown, we know that Mr. Rogers held fifty per cent of the total outstanding stock. That is correct, isn't it?

A. Mr. Rogers held fifty per cent of the stock.

Q. Assuming that Mr. Scharpf held 3.84 per cent and Mrs. Scharpf held 46.16 per cent, and the other 50 per cent was held by Mr. Rogers; what was there to prevent a shifting of the stock interest as between Mrs. Scharpf to Mr. Scharpf, on a 50-50 basis, that is, as to them, each getting 25 per cent of it;

(Testimony of E. R. Bryson.)

what could prevent that being brought into effect?

A. There was nothing to prevent it.

Q. That is what the result of the partnership agreement is, giving Mr. Scharpf 25 per cent of the partnership? [97]

A. That is right.

Q. Why couldn't that shifting of stock have been accomplished?

A. Well, judging from the number of gray hairs in your head, I think you have practiced law long enough to know that, in these inter-family relationships, while it is true Mrs. Scharpf could have given Mr. Scharpf one-half of her stock and accomplished it, still things are not done that way. You do not generally find wives willing, usually, to turn over one-half of their assets to their husbands.

Q. Didn't she consent to the arrangement,—the partnership arrangement?

A. Yes, she consented; but her husband got none of her stock; as a result of the partnership agreement, he got one-fourth interest in the operating company.

Q. But after the partnership arrangement, her stock ownership in the corporation didn't represent an interest in a going concern? Did it?

A. No, it did not.

Q. It was worth only the liquidation value of the real estate?

A. Yes, coupled with the joint ownership or operation of the properties under an operating agreement by the stockholders.

(Testimony of E. R. Bryson.)

Q. What is the fact as to the discussion, if any, as to [98] the scheme under which the partnership would be organized?

A. I cannot remember details like that. That is quite a long distance back, but I would say that it must have been because of the fact that they had been operating that business. They asked me to change the corporate name, and the only way that could possibly be done was the way it was done. I would say that the reason they wanted to retain the old name in the going concern, or in the operating concern, was to conserve the good will that had been built up by the use of that corporate name. I don't remember the details of those requests.

Mr. Pigg: That's all.

The Court: Are there any further questions?

Redirect Examination

By Mr. Davidson:

Q. In the case of a transfer by Mr. Scharpf of a part of his stock to one of his sons, in the corporation, there is nothing that the sons could do to force his recognition, is that right?

A. In the stock of the corporation?

Q. Yes.

A. He could force him to recognize him as a stockholder.

Q. As an employee?

A. Not as an employee, or to take him into the business.

Q. But after the partnership was formed, if Mr.

(Testimony of E. R. Bryson.)

Scharpf [99] had assigned one half of his interest in the partnership to his sons, he would have to accept it, that is, Mr. Rogers would have to accept it, or they would dissolve the partnership?

A. Yes, it could be dissolved.

Mr. Davidson: That is all.

Mr. Pigg: That is all.

The Court: You may stand aside.

Mr. Davidson: This witness will not be desired by the government, will he?

The Court: Is the witness excused?

Mr. Pigg: So far as the government is concerned.

Mr. Davidson: Then you may be excused, Mr. Bryson.

(Witness excused.)

The Court: Is it agreeable that we meet tomorrow morning at 9:30?

Mr. Davidson: That is agreeable.

Mr. Pigg: That is agreeable.

The Court: We will take a recess until 9:30 tomorrow morning.

(Whereupon, at 5:30 p.m., a recess was taken until 9:30 a.m., Tuesday, June 8, 1948.) [100]

9:30 A.M., June 8, 1948

(Met pursuant to adjournment.)

The Court: Are counsel ready to proceed?

Mr. Davidson: Ready, your Honor.

Mr. Pigg: Ready, your Honor.

Mr. Davidson: I will call Mr. Scharpf, who was

on the stand yesterday, for further cross-examination.

The Court: Has cross-examination been concluded of this witness?

Mr. Pigg: It has not, your Honor.

Whereupon,

LOUIS C. SCHARPF

recalled as a witness for and on behalf of the Petitioner, having been previously duly sworn, was further examined and testified as follows:

Further Cross-Examination

By Mr. Pigg:

Q. Mr. Scharpf, I believe when we adjourned, in your cross-examination yesterday afternoon when I was interrupted, among the last things that we were discussing was the connection, if any that Mr. Collins, the accountant, had with the corporation. In these meetings and discussions that were had preliminary to the action taken by the corporation, as reflected by the corporate minutes,—I mean the minutes of the stockholders meeting and the directors meetings that are now in evidence, on the first of January, 1941, did Mr. Collins [102] take any part, or was he present at any of the discussions between you and Mr. Rogers and others that led to the formation of the partnership?

A. I think most of these discussions were with Mr. Bryson, our attorney, and I think we eventually called in the auditor to help out so far as the books were concerned.

(Testimony of Louis C. Scharpf.)

Mr. Pigg: I want the record to show that any reference to Mr. Collins, who has been the representative of the Petitioner, is not made in a personal way. There is nothing personal about it, but merely his association on the question of the tax angle.

Q. (By Mr. Pigg): You say most of the discussions were with the attorney, Mr. Bryson?

A. That is right.

Q. You mean by that, that Mr. Collins was not present, and that you did not discuss the tax angle with him at all?

A. I did not discuss the tax angle about the formation of the partnership.

Q. Did he give you any advice about the tax angle in the formation of the partnership?

A. I don't remember it.

Q. What did you say?

A. I don't remember it; no sir.

Q. Would you say that he did not? [103]

A. I would say that he did not.

Q. Mr. Collins, is he the gentleman at the counsel's table, the third man from the right at the table there (indicating)?

A. Yes.

Q. And do you know whether Mr. Collins prepared the petition of the Petitioner corporation that was filed with the tax court in this proceeding?

A. Yes, I imagine he did.

Q. If his name appears on the petition, would you say that was the same person? Would you?

A. Yes.

(Testimony of Louis C. Scharpf.)

Q. When, Mr. Scharpf, did you first become unhappy or concerned about your status as a stockholder and your interest as represented by your stock in the Petitioner corporation?

A. Well, for quite a number of year; I didn't bring it up to Mr. Rogers until probably a year or two before that time.

Q. Have the services to the corporation, as you described them yesterday, by both Mr. Rogers and yourself, prior to 1941,—

The Court: I believe, counsel, you went over that pretty thoroughly yesterday. Let us not go over it again. That is the trouble about bringing witnesses back on the stand after they have been on the stand.

Mr. Pigg: That is correct, your Honor; but I am going to go into another point.

The Court: I remember that testimony yesterday.

Mr. Pigg: There is just one question on that.

Q. (By Mr. Pigg): Did you receive, each of you, a salary from the corporation of \$7,200 in 1940 for your services? A. I think that is right.

Q. If that is the amount shown on the corporation's returns, would you say that would be the correct figure?

A. Yes, it should be on the books, yes.

Q. I don't remember whether you testified as to where all the property, the real property and fixtures of the corporation were located on January 1, 1941; whether they were at Eugene, Junction City,

(Testimony of Louis C. Scharpf.)

or Cottage Grove, or all three places. Were they at all three places? A. That is right.

Q. Are both Mr. Rogers and yourself still officers of the Petitioner corporation and in the same capacity that you were before?

A. Yes; Mr. Rogers is President and I am Secretary-Treasurer.

Q. Mr. Scharpf, I hand you Petitioner's Exhibit 7 and I call your attention to the item of \$729.40 appearing under your name on that exhibit, as a part of the \$2,000. Do you [105] see that (indicating)? A. Yes.

Q. That is described as borrowed from George L. Scharpf. Does that represent a note or open account, if you know?

A. Well, I don't know. I imagine it was note. We generally borrowed money with notes from the boys.

Q. Do you know whether that \$729.40 had been borrowed from, I believe you said it was your son?

A. Yes.

Q. Was it borrowed before January 1, 1941?

A. I couldn't say that; it was evidently right at that time.

Q. I hand you Exhibit No. 9, which is the minutes of the special meeting of the board of directors of the Petitioner corporation, held on January 2, 1941. I call your attention to the last paragraph which describes the transaction insofar as the indebtedness of the corporation to the individuals

(Testimony of Louis C. Scharpf.)

named are concerned. Can you say whether that is the actual situation, and if that is not different from your testimony yesterday?

A. Can I read this paragraph (indicating)?

Q. Surely. May I say, Mr. Scharpf, I am not trying to trip you in your testimony, or get you to contradict your testimony; I am just trying to refresh your memory.

A. I am trying to understand that (indicating document). [106]

Q. Well, that is going to take some time. I will withdraw the question. I will ask you, Mr. Scharpf, if this Exhibit 9, beginning on page 1 and ending on page 2 of the exhibit, does that not state that the indebtedness by the corporation to Mr. Rogers in the amount of \$2,000 and the indebtedness on the part of the corporation of \$1,500 to Mrs. Rogers, and the indebtedness of the corporation to yourself, Mr. Louis C. Scharpf, \$2,000, and the indebtedness to Eva M. Scharpf, \$2,000,—that the amounts were cancelled? A. Yes.

Q. That is correct?

A. That evidently explains the situation, that the corporation owed John Rogers and myself some salary, and I think it owed some dividends, and that they had a note George and Bill that would tie into this,—I think that would explain it.

Q. Now, referring to the item, Exhibit 9, appearing under your name "Louis C. Scharpf," and to the item of \$729.40. Wouldn't the two exhibits to-

(Testimony of Louis C. Scharpf.)

gether, Exhibits 7 and 9, show that the \$729.40, as it appears in Exhibit 7, refers to the sum borrowed by the corporation, or by you from your son and loaned to the corporation prior to January 1, 1941?

A. Yes, I think prior to January 1, 1941, it owed George L. Scharpf some money.

Q. And that was a part of the indebtedness that was [107] cancelled in this transaction?

A. Yes.

Q. Would the same thing be true with respect to Eva M. Scharpf, in the sum of \$1,126.60?

A. Yes.

Q. Now, this \$729.40, has that been repaid to your son? A. Yes.

Q. And what was the source of the funds from which the repayment was made?

A. Well, the only source I have is the salary and earnings from the partnership.

Q. Referring to the \$1,126.60 item, first, Eva M. Scharpf, (indicating), do you see that?

A. Yes.

Q. What would have been the source of repayment of that item.

A. Well, the source of repayment for that item could have been some of the earnings of the Twin Oaks Builders Supply Company, or some of the earnings from some of her private investments.

Q. Mr. Scharpf, I hand you Petitioner's Exhibit No. 1, which contains the balance sheets of the Twin Oaks corporation from 1935 to 1944, inclusive. I

(Testimony of Louis C. Scharpf.)

call your attention to the column near the center, which is headed "sale to the partnership, January 1, 1941," and to this item of \$7,500 in that column, enclosed in parenthesis, and opposite the words "notes [108] payable," and under "liabilities and capital," and I call your attention also to the fact that the exhibits which I am now handing you,—that the four items at the bottom of that page aggregate \$7,500. It is a fact that this item of \$7,500 on Exhibit No. 1 refers to the same four items on Exhibit 9?

A. I wouldn't know; it is the same amount. I wouldn't know whether it refers to the same amount or to the same transaction or not.

Exhibit 9 represents or refers to the indebtedness of the corporation, does it not, which are cancelled?

A. Yes.

Q. Exhibit No. 1, or "notes payable," refers to the indebtedness owing by the corporation, does it not?

A. That is what it says, "notes payable \$7,500."

Q. It is reasonable to assume they refer to the same item?

A. No, I wouldn't assume anything; I would want to look it up in the books.

Q. Can you determine whether that is a fact or not?

A. I expect so; we have a very good set of books.

(Testimony of Louis C. Scharpf.)

Q. I may have to get at that some other way. Mr. Scharpf, I hand you Petitioner's Exhibit 10, which is the notes receivable, as it appears on the books of the Twin Oaks Company, and represents notes receivable from the Twin Oaks Builders Supply Company; is that correct? A. Yes.

Q. I call your attention to the figure or item of \$89,378.35 appearing on the second column under the words or heading "principal," and under the subheading "indebtedness," also to the right hand column "balance." The same figure appears there, does it not (indicating)? A. Yes.

Q. Handing you Exhibit 11, which is the note signed by Twin Oaks Builders Supply Company dated January 2, 1941, in the sum of \$89,378.35. Those two refer to the same transaction, do they not? A. Yes.

Q. And Exhibit No. 11 was the note given by the partnership in payment, or as a promise to pay the principal amount of \$89,000; is that correct?

A. That is right.

Q. What was the source of the funds with which that note was paid on the date and in the amount shown in Exhibit 10,—that note and its renewal?

A. Well, the source from which that would be paid would be from the earnings of the partnership; sale of some of their assets.

Q. What other assets did the partnership have other than those transferred to it by the corporation?

(Testimony of Louis C. Scharpf.)

A. The assets were the merchandise and the trucks and the bank account, and the book accounts.

Q. The accounts receivable and the cash?

A. Yes.

Q. Being the same assets that were transferred on January 1941 by the corporation; is that correct?

A. That is right.

Q. Mr. Scharpf, I hand you Petitioner's Exhibit 14, which is the schedule, as per the books of the Twin Oaks Builders Supply Company, of rentals received by the Twin Oaks Company, the corporation, from the Twin Oaks Builders Supply Company, the partnership, for the years 1941 to 1948, or, rather, to February 28, 1948, inclusive; is that right?

A. Yes.

Q. Didn't the Twin Oaks Company, that is, the corporation, acquire or purchase property known as the McCormack property in 1941 or during the year 1941?

A. We acquired the McCormack property about that time.

Q. You did? A. Yes.

Mr. Pigg: I will ask that this be marked for identification.

The Clerk: It will be Respondent's B.

(The document referred to was marked as Respondent's Exhibit B for identification.)

Q. (By Mr. Pigg): I hand you Respondent's Exhibit B for identification [111] and ask you if

(Testimony of Louis C. Scharpf.)

that refers to the McCormack property (hands documents to witness)?

A. That is right.

Q. Does that contain any factual information or statements concerning the date?

A. That was purchased in July 1941.

Q. By the Petitioner Corporation?

A. That is right.

Q. From Martha McCormack?

A. That is right.

Q. What was the purchase price of that property?

A. What was the purchase price?

Q. Yes?

A. I don't remember what it was; I would have to look on the books.

Q. Does it not bear, the photostatic copy, in print, and indication that the revenue stamps amount to \$4.40?

A. That is right.

Q. Wouldn't that indicate that the purchase price was between \$3500 and \$4000?

A. I couldn't tell you that.

Q. You don't know? A. No.

Q. Who would know the purchase price?

A. We could look it up in the books; we have the purchase [112] right on the books there.

Mr. Pigg: Your Honor, I understand that counsel for the Petitioner will concede or stipulate that this exhibit does show the purchase price to be between \$3500 and \$4000.

Mr. Davidson: We so stipulate.

(Testimony of Louis C. Scharpf.)

The Court: Very well.

Q. (By Mr. Pigg): Mr. Scharpf, what is the fact as to whether or not this McCormack property was used thereafter in the business of the partnership?

A. The facts were these; the property had a big two-story house on it that we had to tear down, and we tore it down, and there is still a vacant lot there which we use for storage.

Q. For storage of lumber and building materials?

A. That is right; for drivers and storage space; no buildings on it. We wrecked the building.

Q. The storage space is a necessary facility of a lumber business such as yours is it not?

A. That is right.

Q. Did not the Petitioner corporation also buy what is known as the Orem property about December 1943?

A. The Orem property?

Q. Yes? A. Yes. [113]

Mr. Pigg: I will ask that this document be marked for identification as Respondent's next in order.

The Clerk: Respondent's Exhibit C.

(The document referred to was marked as Respondent's Exhibit C for identification.)

Q. (By Mr. Pigg): Mr. Scharpf, I hand you Respondent's C for identification, and I will ask you if that document purports to bear a date,—strike that. I will ask you if that document purports

(Testimony of Louis C. Scharpf.)

to be a deed, and if *it related* to the Orem property?

(Hands document to witness.)

A. That is right.

Q. And if it shows the purchase or acquisition by the Petitioner of this property?

A. That is correct.

Q. Can you tell me the amount of the revenue stamps that are shown on there?

A. There is \$4.15 there (indicating). How much is that? (Indicating.) It is about four dollars and something.

Q. Do you know the purchase price that was paid for the Orem property?

A. No, I don't without referring to the books.

Q. Do you know whether the revenue stamps as they appear on Exhibit C for identification would show a purchase price of from \$4500 to \$5000? [114]

A. No; I wouldn't know how that figures out.

Mr. Pigg: Will counsel stipulate that the purchased price of the Orem property was \$2500?

Mr. Davidson: That is stipulated.

Q. (By Mr. Pigg): What type or character of property is the Orem property, Mr. Scharpf?

A. It is a residence.

Q. It has been a residential property, and it was a residential property at the time it was acquired, and has remained such until the present time?

A. Yes.

Q. Is it rented or occupied by tenants?

(Testimony of Louis C. Scharpf.)

The Court: What is the date when the consideration of that \$2500 was given?

Mr. Pigg: December 1, 1943, Your Honor.

The Court: 1943?

Mr. Pigg: Yes, Your Honor.

Q. (By Mr. Pigg): Do you know the amount of the annual or monthly rental paid by the tenants of that property, Mr. Scharpf?

A. Well, recently it has been, I think, \$66 a month or something like that.

Q. Is that more or less than it was immediately after December 1, 1943? [115]

A. Well, I would not know without referring to the records; I could not say.

Q. Do you know whether the rental has been increased by the corporation; whether the rental charges by the corporation have been increased since the acquisition?

A. No, I don't. That was really Mr. Rogers' share of the work, and I am not too familiar with it.

Q. To whom does the tenant of that property make payment of the rental?

A. To the Twin Oaks Builders Supply Company, you mean?

Q. Yes. A. That is right.

Q. The partnership? A. That is right.

Q. Mr. Scharpf, I hand you Petitioner's Exhibit 20, which is a report of the Eugene, Oregon building permits for the past 33 years, beginning in 1914 (hands document to witness).

A. That is right.

(Testimony of Louis C. Scharpf.)

Q. Where and in what localities, cities or towns, does the Twin Oaks Builders Supply Company have its customers or have its trading area?

A. Well, we have a store in Junction City.

Q. Do you have a store in Cottage Grove?

A. Not now. [116]

Q. You did? A. Years ago, yes.

Q. You did in 1941? A. No.

Q. What did you have in Cottage Grove?

A. Well, we had a warehouse site down there.

Q. How far is that from Eugene?

A. About 22 miles.

Q. How far is it from Junction City.

A. That would be 14 miles further. It would be 36 miles from Junction City.

Q. Now, what constitutes the trade area of the Twin Oaks Builders Supply Company?

A. Well, It is all the trading area adjacent to Eugene and Junction City.

Q. The customers of the Twin Oaks Builders Supply Company are not confined only to Eugene, Junction City and Cottage Grover, are they?

A. No; we have some farm trade; some farmers trade with us.

Q. Prior to January 1, 1941, what services, if any were rendered by Mrs. Scharpf to the corporation?

A. No services; she was simple a stockholder.

Q. Prior to the same date, what services, if

(Testimony of Louis C. Scharpf.)

any, were rendered by Mrs. Rogers to the corporation? [117]

A. No services at all.

Q. Subsequent to January 1, 1941, what services, if any, have been rendered by Mrs. Scharpf to the partnership?

A. Well, she often signs the payroll checks, and the checks in payment of notes payable, and other checks, and lists the accounts receivable once a month, and advises us about things.

Q. Who prepares these payroll checks?

A. You mean to the point they are ready for signature?

Q. Yes. A. The Bookkeepers.

Q. Does Mrs. Scharpf supervise or instruct the bookkeepers how to prepare these payrolls and payroll checks? A. No sir.

Q. Subsequent to January 1, 1941, what services, if any, have been rendered by Mr. Rogers to the partnership?

A. Just about the same type of work.

Q. The same type as Mrs. Scharpf?

A. That is right.

Q. Doesn't she sign payroll checks and payrolls and so forth.

A. Yes; and lists the accounts receivable.

Q. What are the circumstances which determine whether or not Mrs. Rogers or Mrs. Scharpf will sign payroll checks?

A. There is no determination; whoever is handy.

(Testimony of Louis C. Scharpf.)

They usually have to do it in the nights; the girls sign them in the evening.

Q. Whoever happens to be available?

A. That is right.

Q. Are they signed at the home or office?

A. In both places. The listing of the accounts, of course, has to be done at the office.

Q. Are the payroll checks ever signed by either Mr. Rogers or yourself? A. Yes.

Q. How many employees are there on the payroll?

A. How many employees are there on the payroll?

Q. Yes. A. About 30.

Q. How often are they paid?

A. Every two weeks.

Q. So there would be approximately sixty payroll checks to sign a month?

A. That is right.

Q. Mr. Scharpf, going back to the McCormack property, I believe you said that was one on which a building was located at the time of its acquisition and it was removed and wrecked?

A. That is right.

Q. You said the Twin Oaks Builders Supply Company [119] wrecked the building, or caused it to be wrecked?

A. We hired somebody to wreck it.

Q. Who do you mean by "we"? The partnership?

(Testimony of Louis C. Scharpf.)

A. Well, I don't know; I don't know who that was.

Q. Is it a fact or is it not a fact that the partnership did hire the wrecking of the building and paid for the wrecking of the building and putting the property in a condition of usefulness for the storage of lumber and other materials for your business? That is a fact, isn't it? A. I think so.

Q. Do you have any reason whatever to doubt that that is a fact?

A. Well, that is a matter that you would have to look up on the books in order to be absolutely sure.

Q. You are the secretary of the corporation and handle the affairs in the manner that you described?

A. That's right.

Q. And you handled the partnership affairs and have been doing so in the manner you have described? A. That's right.

Q. Wouldn't you know whether the partnership paid for the wrecking of the building?

A. I wouldn't know at this time; I would not remember now. I would probably have known it at the time.

Q. Did the corporation, or has the corporation at any [120] time since January 1, 1941, engaged in any such transactions or made payments for the removal of the building, or otherwise?

A. That is the only building that we would have removed.

(Testimony of Louis C. Scharpf.)

Q. And being the only one, you would normally know whether the corporation had it removed or whether the partnership had it removed, wouldn't you?

A. Well, I couldn't say. All I could say is that the partnership removed the building because we had to remove the building, and we had to use the property.

Q. Mr. Scharpf, what is the age of your son, George L. Scharpf? A. Thirty-three.

Q. At the present time? A. Yes.

Mr. Pigg: I think that is all I have.

The Court: The Petitioner will proceed with the redirect examination.

Redirect Examination

By Mr. Davidson:

Q. Mr. Scharpf, is it possible that perhaps it did not cost anything to remove the building, that somebody might have removed the building for getting the building, that is, taking it off for the building itself?

A. It could have been at that.

Q. You don't remember? [121]

A. I don't remember the details of it.

Q. Who handled that? A. Mr. Rogers.

Q. Now, Mr. Pigg brought out on cross examination that the partner's contribution to the capital of the partnership of \$7500 consisted of funds owing by the corporation to you, Mrs. Scharpf, and Mr. And Mrs. Rogers, and your son George, didn't he?

(Testimony of Louis C. Scharpf.)

A. Yes.

Q. Were those bona fide debts from the corporation to you? A. That is correct.

Q. And was there a salary legally due you at that time? A. Yes.

Q. In the amounts shown? A. Yes.

Q. How about George's indebtedness from the corporation; how did that originate?

A. Well, George, as well as Bill, fell heir to some money from their grandmother, and they loaned it to the corporation in order to get some interest.

Q. And were they paid for the money that they loaned to you.

A. We certainly did pay them.

Q. You and Mrs. Scharpf paid them for the money [122] borrowed?

A. We certainly did.

Q. Was there any reason that the corporation would not have to pay this debt in cash if you handled the transaction that way?

A. There is no reason at all; it was just a way of handling it.

Q. You could have withdrawn the money as cash, and then put it into the partnership as cash?

A. Yes.

Q. Wasn't the effect the same, that all you did was to reduce the purchase price of the assets by the amount of this indebtedness?

Mr. Pigg: That is leading, I will object to it.

The Court: Yes, it is leading.

(Testimony of Louis C. Scharpf.)

A. It was simply a matter of bookkeeping. We could have issued a check for my salary and for the salary of Mr. Rogers, and the dividends, and all that, and the interest, and then given the checks back; it is all one and the same thing.

Q. (By Mr. Davidson): Mr. Scharpf, you testified that Mrs. Scharpf, to your knowledge had not voted her stock contrary to your wishes. Is that correct? A. Yes. [123]

Q. Did you ever vote her stock contrary to her wishes? A. No.

Q. As a matter of fact, you and Mr. Rogers controlled the corporation as against Mrs. Scharpf, didn't you? A. Yes, I think so.

Q. You testified that your duties were the same, in general at January 1, 1941, in connection with the partnership as they were in connection with the corporation prior to that?

A. That's right.

Q. Was that true of the employees? Did the truck drivers continue to drive the trucks?

A. Just the same way.

Q. Were there any differences in your duties from what they would have been if the corporation had been entirely dissolved.

A. None whatsoever.

Q. In other words, they were the normal duties of carrying on the business?

A. That is correct.

(Testimony of Louis C. Scharpf.)

Mr. Davidson: I would like to have this marked for identification.

The Clerk: Petitioner's No. 30.

(The document referred to was marked as Petitioner's Exhibit No. 30 for identification.)

Q. (By Mr. Davidson): I hand you here, a document marked for the purposes of identification as Petitioner's No. 30 (indicating). Referring only to the printed matter on that, will you tell me what that piece of paper is?

A. This is the letterhead of the Twin Oaks Builders Supply Company, a corporation.

Q. And in what way is that designated as the corporation letterhead?

A. It has the name of John J. Rogers as President, and L. C. Scharpf as Secretary, at the top of the letterhead.

Q. Was that letterhead in use prior to the formation of the partnership? A. Yes.

Mr. Davidson: I would like to offer in evidence Petitioner's 30.

The Court: Is there any objection?

Mr. Pigg: No objection.

The Court: It will be received in evidence and marked as Petitioner's 30.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 30 for identification, was received in evidence as Petitioner's Exhibit No. 30.)

(Testimony of Louis C. Scharpf.)

Mr. Davidson: I would like to have this document marked as the next Petitioner Exhibit.

The Clerk: Petitioner's 31. [125 & 126]

(The document referred to was marked as Petitioner's Exhibit No. 31 for identification.)

Q. (By Mr. Davidson): I hand you herewith a document which has just been marked for identification as Petitioner's 31. Will you tell me what that is?

A. That is the letterhead of the Twin Oaks Builders Supply Company, the partnership.

Q. In what way is it distinguished from the letterhead of the corporation?

A. It does not have the names of the officers.

Q. Was this letterhead, Petitioner's Exhibit 31, in use by the partnership after January 1, 1941?

A. Yes.

Mr. Davidson: We offer that in evidence.

The Court: Is there any objection?

Mr. Pigg: There is no objection.

The Court: It will be admitted and marked as Petitioner's 31.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 31 for identification, was received in evidence as Petitioner's Exhibit No. 31.)

Q. (By Mr. Davidson): Now, did you represent to anyone after January 1, 1941, that the operating company, the Twin Oaks Builders Supply [127] Company, was a corporation? A. No.

(Testimony of Louis C. Scharpf.)

Q. Did you file an assumed name certificate?

A. Yes.

Q. Did you understand that that was a notice to the world that you were in partnership?

A. That is the reason I figured it, and it had to be published in the paper.

Q. Mr. Scharpf, I hand you Petitioner's Exhibit 5, being a statement of the earning of the partnership for the calendar years 1941 to 1944. The final figures at the bottom of each column show the net income for each of the years. Will you state whether that income is before or after salaries for yourself and Mr. Rogers.

A. That would be before there was any salaries deducted.

Q. In other words, the income of \$29,000 for 1941 was before any salaries?

A. That is correct.

Q. And for 1942 the income of \$18,000 was before any salaries?

A. That is right.

Q. And the same for 1943 and 1944 \$44,000?

A. Yes.

Q. The income tax return in evidence for 1944 [128] shows a salary of \$14,000 for the two of you.

A. For Mr. Rogers and myself.

Q. Yes? A. Yes.

Q. Was there any increase in the salaries between 1941, and 1942, if you know?

A. So far as common labor was concerned, there was an increase.

(Testimony of Louis C. Scharpf.)

Q. Was there any increase in salary?

A. Well, I don't know. There perhaps was.

Q. Now, you spoke about wanting to go into the partnership so that you could liquidate your interest. Will you explain that a little bit further?

A. Well, that was one reason that I wanted to go into the partnership, so that my interest could be liquidated in case I wanted to get out. The other reason would be, I wanted to get a real owner's interest in the business.

The Court: I think that was gone into quite thoroughly yesterday.

Mr. Davidson: I thought there might be some misunderstandings because of the cross-examination.

Q. (By Mr. Davidson): Have you finished your answer?

A. I just wanted to get an owner's interest in there, so that I would have a decent share of the profits available [129] to me, if any.

Q. Mr. Scharpf, have you prepared a financial statement for yourself as of January 1, 1941?

A. Yes.

Q. Do you have it? A. I have it here.

Q. Will you give it to me?

A. Surely. (Hands document to counsel.)

Mr. Davidson: I would like to have this marked for identification.

The Clerk: Petitioner's 32 for identification.

(The document referred to was marked as Petitioner's Exhibit No. 32 for identification.)

(Testimony of Louis C. Scharpf.)

Q. (By Mr. Davidson): I have a document marked as Petitioner's 32 for identification. Is that your financial statement as of January 1, 1941?

A. That is it.

Q. Did you prepare that personally?

A. Yes.

Q. Is it correct? A. Yes.

Mr. Davidson: I would like to offer it.

Mr. Pigg: No objection.

The Court: It will be admitted as Petitioner's 32. [130]

(The document referred to, heretofore marked as Petitioner's Exhibit No. 32 for identification, was received in evidence as Petitioner's Exhibit No. 32.)

Mr. Davidson: That is all.

The Court: You may stand aside.

Mr. Pigg: Just a minute, I have some re-cross.

The Court: Let us not go over the same thing.

Recross Examination

By Mr. Pigg:

Q. Mr. Scharpf, what was the rate of interest paid by the corporation to your son, George L. Scharpf, for any sums borrowed from him?

A. I could not say accurately. I think it was four per cent, but I don't know.

Q. Who is W. L. Scharpf?

A. That is my younger son.

Q. How old is he?

A. He is thirty-one now.

(Testimony of Louis C. Scharpf.)

Q. As far as any interest paid by the corporation for sums borrowed, would the interest rate be the same?

Mr. Pigg: That is all, Your Honor.

The Court: You may stand aside.

(Witness excused.)

The Court: Call the next witness.

Mr. Davidson: I will call Mr. Rogers. [131]

Whereupon,

JOHN J. ROGERS

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Will you state your name?

A. John J. Rogers.

Q. Mr. Rogers, in the interest of shortening the time, most of the matters were stipulated to. You were and are a president of the Twin Oaks Company at Eugene? A. That's right.

Q. And you became interested in the company in 1928? A. Yes.

Q. And you are one of the partners in the Twin Oaks Builders Supply Company? A. Yes.

Q. And you have owned and still own some 473 shares of the capital stock of the Twin Oaks Company, which amounts to one half of the outstanding capital stock? A. That is right.

(Testimony of John J. Rogers.)

Q. Now, Mr. Rogers, when was the matter of forming a partnership to carry on the operations first broached to you? [132]

A. I would have to, of course, give an approximate date, because I cannot remember eight or ten years back very accurately. I can only say approximately the time.

Q. Yes, we understand.

A. The incorporation was in the first of January, 1941, and I would estimate that Mr. Scharpf had been discussing this matter with me for fifteen or eighteen months.

Q. Did the suggestion come from Mr. Scharpf?

A. Absolutely.

Q. When this suggestion was first made, were you agreeable to it? A. No sir.

Q. And what were your objections?

A. They were the same always; I have been in business for,—up to that time I had been in business for almost 40 years, and entirely in a corporation. And I am not a lawyer, but my experience had all been with corporations, and I knew something about them and I preferred them. I knew that a partnership had unlimited liability. After the other war, I lost practically everything I had, and I didn't want to jeopardize what I had in 1940 and 1941 by going into a new type of business structure.

Q. You did, however, consent to the formation of a partnership?

A. After a long negotiation. [133]

(Testimony of John J. Rogers.)

Q. Why did you consent to it?

A. Because of my high respect for my partner, and because of the knowledge that business men either get along together or they do not get along, and in such cases, they do not succeed.

Q. Why didn't you dissolve the corporation?

A. I felt that as a measure of safety, in the event of anything happening to the partnership, the structure of the corporation would still be left, and we could start on again.

Q. What was Mr. Scharpf's attitude toward dissolving the corporation?

A. He wanted to dissolve the whole thing.

Q. You prevailed then on that point?

A. Yes.

Q. Now, at whose suggestion was it that Mrs. Rogers be taken into the partnership?

A. Well, we had been two families in that business up to 1941, the Scharpf family and the Rogers family, and although I was the only member of the corporation, still it was a family affair purely and simply, and we were a very friendly partnership; there were two Scharpfs and one Rogers, and I felt that the balance should be maintained. Furthermore, Mrs. Rogers had some money that she would like to put into the partnership, and I could see no reason why she should not [134] do it, and there was no objection on the part of Mr. and Mrs. Scharpf to that attitude, and, I would say, briefly, that was the reason.

(Testimony of John J. Rogers.)

The Court: Were those separate funds that Mrs. Rogers used, which went into the business?

The Witness: Judge, every penny of it was hers. She had more if it had been wanted.

Q. (By Mr. Davidson): Did you discuss the matter of income taxation at or about the time the partnership was formed with anyone?

A. Yes.

Q. With whom did you discuss it?

A. May I elaborate a little bit on my answer, and not answer by just "yes" or "no"?

Q. Yes.

A. We had not been making any money. For ten or eleven years, we had three or four years where we had lost during the depression, and our average years I am embarrassed to tell you what they were prior to 1941, but if you wish me to tell you, I will.

Q. What were they?

A. They were about \$1100 a year for about eleven years. The matter of taxes, of the income, and that sort of thing, that was not a matter of consideration, excepting that, as a part of this structure, we would naturally go into it. [135] When a man goes into a new type of business, he naturally discusses the tax angles, but it was not discussed with the idea of reducing the tax. I didn't know whether they were going to be increased or decreased; I didn't care, because our profits were so small.

(Testimony of John J. Rogers.)

Q. Do you know about the removal of this house from the McCormack property that Mr. Scharpf testified about?

A. Of course I have a pretty fair memory, but we have a good bookkeeper and the books have been carried quite accurately, or, very accurately. I *should and* they show the correct details. However, I can tell you a lot about that. I am quite positive that we had a wrecker take out the doors and windows and the plumbing fixtures and the bathroom, and I think the wrecker got them for wrecking it.

Q. Your recollection is that neither the partnership or the corporation, paid anything for it?

A. No, I don't think so. I would say that is ninety five per cent correct. It may be a hundred per cent correct; I think it is, possibly.

Q. Do you remember anything about the rates of rental on the Orem property?

A. Mr. Scharpf stated that accurately; we got \$66.67. I remember it, because it ran for quite a number of years, and that is the way it was.

Q. Has it been that way since? [136]

A. There has been no change since the old building was bought.

Mr. Davidson: That is all. You may cross examine.

The Court: What about the rental that the parties agreed to pay the corporation?

The Witness: The whole rental was \$250.

(Testimony of John J. Rogers.)

The Court: The partnership agreed to pay that to the corporation?

The Witness: Yes.

The Court: Was that the ordinary or usual rental for that property?

The Witness: May I tell you, that for ten years the State Highway Commission has had drawings made and plans perfected to put a highway right through our structure, our plant, not only in Eugene, but in Cottage Grove, Oregon, also, and we, in arriving at the rentals, to the very best that honest men could do, we think we arrived at a fair amount.

The Court: And what percentage would that be on the valuation of the property?

The Witness: Oh, I would say,—I would say about between 7 and 9 per cent.

The Court: The rental would be from 7 to 9 per cent of the value of the property?

The Witness: Yes; but the value was indeterminate.

The Court: But the way you regarded the property, [137] it was from 7 to 9 per cent of what you considered to be the value of the property?

The Witness: Yes.

The Court: And you considered that as a reasonable rental, did you?

The Court: That is all I have. Are you through with the direct examination?

Mr. Davidson: Yes, I am.

(Testimony of John J. Rogers.)

The Court: We will take a ten-minute recess.

(Whereupon a ten-minute recess was taken.)

Mr. Davidson: I would like to ask a couple more questions, if the Court please.

Q. (By Mr. Davidson): Mr. Rogers, during the year 1941 and subsequent thereto, the building materials business has been operated at Junction City and Eugene; is that right? A. That is right.

Q. About what proportion of sales are made in each of those two places?

A. Well, about one tenth of the total is made at Junction City.

Q. And the balance at Eugene?

A. That is right.

Q. When did the corporation acquire the Cottage Grove property? [138]

A. In 1929, I think.

Q. And how much did it cost?

A. It cost approximately eight or nine thousand dollars.

Q. What was that property? Was that a going retail lumber yard at the time you bought it?

A. Yes.

Q. And did the Twin Oaks Builders Supply Company, a corporation, continue in business there?

A. For ten years.

Q. When did you quit?

A. Not ten years, we operated there for about eight years.

Q. When did you quit the business there?

(Testimony of John J. Rogers.)

A. 1937.

Q. What was the status of that property when you quit the business in 1937, and up to 1940?

A. It was non-productive.

Q. Has it been operated as a yard since that time? A. No sir.

Q. And what has been done to the property now?

A. Well, it was a big shell of a warehouse, and it was strongly built, and in the course of time it became useful and used by various people living down there for storage of automobiles and farm implements, and things of that kind.

Q. Now, what was the cost of the Junction City property [139] owned by the corporation as of January 1, 1941?

A. I think I can be quite accurate about that. We rented a restaurant in the store, in the stern, and about two or three lots in the back; and the lots in the back and the small sheds, they were about,—I would say the cost was around \$2500.

Q. And that \$2500 was the only investment that the corporation had in Junction City?

A. Yes.

Q. Did the partnership take over the lease on the rented property? A. Yes.

Q. And that was owned by strangers?

A. Yes.

Mr. Davidson: That's all.

The Court: Proceed with the cross examination.

(Testimony of John J. Rogers.)

Cross-Examination

By Mr. Pigg:

Q. Mr. Rogers, as I understood you, you mean that the business, as such, was discontinued at Cottage Grove in 1937? A. That's right.

Q. And since that time the property has been used for a yard, as a facility of business in general,—a storage yard?

A. Well, it has been a shed there, but it has been non-productive of revenue. [140]

Q. When you say non-productive, is that because you made no sales from there?

A. I mean just like a building over here that stands idle, producing no revenue.

Q. But you store lumber over there, or did?

A. No sir.

Q. You didn't use it as a storage facility?

A. It is about 22 miles, Mr. Pigg, from Eugene; it is an impractical distance to store materials and carry them back and forth. We have wished a thousand times it was a lot nearer so that we could use it.

Q. It was not any use of or any facility of the business whatsoever, and has not been since January 1, 1941?

A. I was not quite as accurate as that. I gave Mr. Hyde a memorandum showing the income from the warehouse, and it did include a few hundred dollars in 1940; yes, I think that is right.

Q. These people are residents of Cottage Grove

(Testimony of John J. Rogers.)

who use it for storage purposes, as you mentioned, and they pay you rentals for the use of it, do they not? A. Yes.

Q. As concerns the rentals paid by the partnership to the corporation under the lease agreement, I believe you said you figured that was from 7 to 9 per cent of what you regard as the value of the property? [141] A. Yes.

Q. Was that before or after taxes and depreciation?

A. Well, I didn't figure it as accurately as that; I did not figure it that way.

Q. Under the lease agreement, the corporation is required to pay the taxes, is it not?

A. I think so. Will you ask that question again?

Mr. Pigg: Will you read the question, Mr. Reporter.

(Whereupon the above question was read aloud by the reporter as above recorded.)

A. Yes.

Q. What is the answer? A. Yes.

Q. (By Mr. Pigg): And the obligation of the lessee was to return the property or surrender the property upon the termination of leasehold in as good a condition as received, subject to ordinary depreciation and wear and tear; is that correct?

A. I think so.

Q. Mr. Rogers, do you happen to know the rate of interest that was paid by the corporation and

(Testimony of John J. Rogers.)

written off in a sum loaned the corporation by the sons and children of Mr. and Mrs. Scharpf?

A. Those notes run back quite a while. I am guessing but I would say they are about four per cent; maybe four or [142] five per cent.

Q. In the conduct of your business, and from your business experience in general over the period of years that you have described, did you ever have occasion to negotiate commercial loans with the banks and other financial institutions?

A. Yes.

Q. Are you familiar with the prevailing interest rate in Eugene on commercial loans from banking institutions?

A. Well, we don't borrow much money. We occasionally do, but when we do the banks are good customers of ours and when we want some money we sign the note and observe the rates. We do not dicker for the rates.

Q. What rates of interest do you pay in those instances, as a rule? A. About five per cent.

Q. As high as six per cent sometimes?

A. Yes.

Q. On commercial loans?

A. Yes; in some years it has been as high as eight or ten; sometimes six and sometimes five.

Q. Commercial loans are generally unsecured loans, are they not? A. Yes.

Q. Speaking of January, 1941, what would have been, [143] according to your business experience,

(Testimony of John J. Rogers.)

the probable prevailing interest rate on commercial loans at that time?

A. Mr. Pigg, I would like *to on* record, but I cannot; it would be an inaccurate answer, and you want a positive answer.

Q. You don't know?

A. Now I would not say, sir.

Q. The small profits that you mentioned as having been earned by the corporation,—net profits,—in the earlier years, or prior to 1941, I think you related your answer to that,—was that before or after the payment of officers' salaries?

A. That was net.

Q. After payment of salaries? A. Yes.

Q. So far as the taxation aspect of the transaction made in January 1941 was concerned, with whom were those matters discussed, if at all?

A. Well, it was talked back and forth. I was entirely hostile to the idea, and the matter of dodging taxes was not part of my mental thought. Taxes are a part of a business man's thoughts, these days, and they were, of course, discussed by my partner, Mr. Scharpf and by myself, and I know I must have mentioned that to Mr. Collins with the idea of finding out what the situation was. As I say, we had made no money, and taxes were of no vital concern, and I wanted to be sure [144] that the partnership arrangement created no increase in taxes, that is, to the partners; and he shared my thought. I presume I should have known that, I am frank to

(Testimony of John J. Rogers.)

admit that that is a statement that I made to him. I discussed with Mr. Bryson, in a non technical way. I discussed it with business friends, that is, not necessarily taxes, but I discussed the change.

Q. Did Mr. Collins advise you of the tax aspects of the situation?

A. He told me I think,—Mr. Pigg, you are asking me questions that are eight years old.

Q. I realize that, but we cannot control that.

A. My memory is not one hundred per cent and I want to be truthful. He told me that the taxes would not be raised. It was to that effect.

Q. Does your memory serve you sufficiently so that you can tell me whether or not the tax aspect, according to the information given you would operate to reduce the matter of the overall tax?

A. I would say that he possibly may have discussed that.

The Court: Was the testimony of the change from the corporation to the partnership that it was for the consideration of reducing taxes; was that any part of your thought?

The Witness: No sir. My reason for changing to the partnership was for cooperation and teamwork with a man [145] I have worked with for fifteen years, who wished that, who had been conducting the sales department.

Q. (By Mr. Pigg): Mr. Rogers, prior to 1941, the Twin Oaks Builders Supply Company had had controversies with the Department, or the Bureau

(Testimony of John J. Rogers.)

of Internal Revenue on tax matters, had it not? I will relate it to another matter, so far as taxes for officers salaries are concerned? Does that refresh your memory?

A. I think there was some controversy; I think there was some controversy as to the salaries we were allowing ourselves.

Q. Concerning the amount that Mrs. Rogers put into the business in 1941 and the amount that she actually put up in cash, that was \$500, wasn't it?

A. She put up \$2000.

Q. How did she put up the \$2000?

A. Well, as I recall it, the Twin Oaks Company, the corporation, was owing her \$1500. We had agreed among the group that \$8000 was an adequate amount for refinancing. Our average borrowings had been about \$6500 in the previous four or five years, so we figured \$8000 was an adequate amount. She had the \$1500 available from the corporation. My sons have funds left them by their grandparents, and she turned to Bob and borrowed by a note, which she signed and he [146] accepted, and which has since been paid; and I think it can be produced. That was with respect to the \$1500. And she had not only that five hundred dollars that she could draw upon, but she had other assets, too.

Q. Under the arrangement, as it was actually consummated, it was only necessary for her to put up \$500 cash?

(Testimony of John J. Rogers.)

A. In addition to what the corporation owed her.

Q. And that only represented an indebtedness to the corporation in the sum of \$1500.

A. It was as good a note as was ever written; it was due and payable.

Q. And after the partnership transaction, the corporation owed no longer the \$1500 under the arrangement that she made? A. That is right.

Q. The note, the \$1500, so far as that was concerned, that went into the partnership business?

A. Oh, yes; that is a technical point. The corporation paid her the \$1500.

Q. How did it pay her the \$1500?

A. I suppose in the normal way. I have not the books, but I suppose it was paid by a check.

Q. Mr. Rogers, assuming that Petitioner's 9, which is the minutes of the special meeting of the board of directors of the Twin Oaks Builders Supply Company, dated January 2, 1941, [147] discloses, as a fact, that as to Mrs. Rogers there was a cancellation of an indebtedness owing by the corporation to Mrs. Rogers to the extent of \$1500. Would you say that is a correct statement of the transaction?

A. I would not dispute those minutes.

Q. Is that your understanding as to what actually happened?

A. If you had met me on the street and asked me how the transaction was made, I would have told you that I presumed the corporation paid Mrs.

(Testimony of John J. Rogers.)

Rogers \$1500 with a check, and that she took that check, and deposited it in the bank, and added \$500 which she got from her son, which would make \$2000, and then turned that over to the partnership.

Q. If the records show otherwise?

A. Whatever is honest and is a fact, of course that would prevail.

Q. Do you know at whose suggestion it was that the capital contributions to the partnership were handled in that manner as they actually were? Who made the suggestion that the matter be handled in that way?

A. Explain what you mean, please.

Q. I mean, that, according to the exhibits and the evidence of record, \$7500 of the \$8000 that you mentioned represented cancellations of indebtedness owing by the corporation to the several parties.

A. That's right.

Q. And the remaining \$500,—

Mr. Davidson: In the interest of the economy of time, I am going to object. This matter is absolutely immaterial as to how that was put in or just what was done, whether it was done by check or not.

The Court: Well, I think it is all right to go ahead and prove all the facts surrounding it. I will overrule the objection.

Q. (By Mr. Pigg): And the remaining \$500 was a cash contribution paid by Mrs. Rogers. Now,

(Testimony of John J. Rogers.)

at whose suggestion, or upon whose advice, if anyone's was the transaction carried out or consummated in that manner?

A. Well, we were going into a new deal, and we needed a little more capital, apparently. We needed \$8000, and I presume Mr. Scharpf and I talked that over, and we probably discussed it with Mr. Bryson, and we probably discussed that with Mr. Collins. I am quite sure that we did.

The Court: Each of you had a \$2000 interest in the partnership, equally?

The Witness: That is right.

Mr. Pigg: I don't recall, Mr. Rogers, whether you stated at whose suggestion it was that Mrs. Rogers was brought into the partnership? [149]

A. I think I probably made that suggestion.

Q. What was the purpose of bringing her into it?

A. Well, there were two Scharpfs, Mr. and Mrs. Scharpf, and in the event of a vote we wanted equal representation on the Rogers family. I wanted her more intimate familiarity with the business.

Q. The business, I believe you said, in substance, was more or less of a family affair or a two-family affair in the beginning, prior to this transaction in January 1941?

A. That is right.

Mr. Pigg: That is all I have, Your Honor.

The Court: Are there any further questions?

Mr. Davidson: Just a question or two.

(Testimony of John J. Rogers.)

Redirect Examination

By Mr. Davidson:

Q. Mr. Rogers, so far as the indebtedness to Mrs. Rogers was concerned, was that a bona fide indebtedness of the corporation.

A. One hundred per cent.

Q. Whose funds did she loan to the corporation?

A. She loaned her own funds.

Mr. Davidson: That's all.

Mr. Pigg: No further question.

The Court: You may stand aside.

(Witness excused.) [150]

The Court: Call your next witness.

Mr. Davidson: Mrs. Scharpf.

Whereupon,

EVA M. SCHARPF

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Will you state your name?

A. Eva M. Scharpf.

Q. Mrs. Scharpf, you are the wife of Louis C. Scharpf?

A. Yes.

Q. And you are a stockholder of the Twin Oaks Company, the Petitioner herein?

A. Yes.

(Testimony of Eva M. Scharpf.)

Q. And also an equal partner in the Twin Oaks Builders Supply Company, the partnership?

A. Yes.

Q. According to Petitioner's Exhibit 18, which is in evidence, you were, on January 1, 1941, the owner of 437.7 shares of the capital stock of the Twin Oaks Company; is that substantially correct?

A. It is.

Q. And did you purchase those shares of stock with [151] your own funds? A. Yes.

Q. And what was the source of your funds?

A. I inherited them.

Q. From whom? A. My father.

Q. What was his name?

A. George P. Fanning.

Q. When did he die? A. 1923.

Q. Approximately what was the net amount of your inheritance?

A. It was between \$45,000 and \$50,000.

Q. Well now, you were a party to the partnership agreement which was executed in January, 1941, between the Twin Oaks Company, the corporation, and the Twin Oaks Builders Supply Company, the partnership? A. Yes.

Q. Did you enter into that voluntarily?

A. Yes.

Q. You understood what was done?

A. Yes.

Q. You understood that you were becoming liable as a partner from then on?

A. Yes. [152]

(Testimony of Eva M. Scharpf.)

Q. And you were aware of the fact that Mr. Scharpf would then have one fourth interest in the partnership? A. Yes.

Q. Have you prepared a personal financial statement as of January 1, 1941? A. Yes.

Q. Do you have it? A. Yes.

Q. May I have it?

A. Surely (hands document to counsel).

Mr. Davidson: I will ask that that be marked for identification with the next exhibit number in order.

The Clerk: Petitioner's 33.

(The document referred to was marked as Petitioner's Exhibit No. 33 for identification.)

Q. (By Mr. Davidson): I hand you here a document marked as Petitioner's 33 for identification; will you say what that is?

A. That is a financial statement of Eva M. Scharpf as of January 1, 1941.

Mr. Davidson: I will offer in evidence.

The Court: Is there any objection?

Mr. Pigg: No objection.

The Court: It will be admitted in evidence and marked as Petitioner's 33. [153]

(The document referred to, heretofore marked as Petitioner's Exhibit No. 33 for identification, was received in evidence as Petitioner's Exhibit No. 33.)

Mr. Davidson: I would also like to have this

(Testimony of Eva M. Scharpf.)

marked for identification with the next exhibit number.

The Clerk: Petitioner's 34.

(The document referred to was marked as Petitioner's Exhibit No. 34 for identification.)

Mr. Davidson: I offer at this time as Petitioner's 34, a duly and properly certified certificate of the probate record in the matter of the estate of George P. Fanning.

The Court: Who was Mr. Fanning?

Mr. Davidson: He was the father of Mrs. Scharpf, who is testifying.

Mr. Pigg: No objection. As I understand it, it is only collaborative.

The Court: It will be admitted and marked as Petitioner's 34.

(The document referred to, heretofore marked as Petitioner's Exhibit 34 for identification, was received in evidence as Petitioner's Exhibit No. 34.)

Mr. Davidson: That is all for me.

Cross-Examination

By Mr. Pigg:

Q. Mrs. Scharpf, concerning the partnership agreement [154] that you signed on January 1941, and your understanding of it as you have explained it here, what is the fact as concerns your family relationships between your husband and yourself as to the family investment in the Twin Oaks business before January 1941, as compared thereafter.

(Testimony of Eva M. Scharpf.)

A. Well, I had most of the stock in the corporation, and then in the firm,—in the partnership,—

The Court: Speak a little louder.

The Witness: I had most of the shares in the corporation, and then when they formed the partnership Mr. Scharpf felt it was not any more than right that I ought to go in as a partner, having had so many shares in the corporation.

Q. You went in in that manner at the suggestion and request of your husband? A. Yes.

Q. And you understood at that time that, under the partnership arrangement, he was to receive one fourth of the total earnings as compared with or as distinguished from the dividends on the number of shares that he held in the corporation?

A. Yes.

Q. Did you regard the investment in the business of the Twin Oaks Company, or the Twin Oaks Builders Supply Company, so far as you and your husband were concerned, as a family unit, any differently after 1941 than you did before. [155]

A. When I held the shares in the corporation I had nothing to do with it, only I had the shares in there. When we formed the partnership, then I had a little more to do with it.

Q. What more did you have to do with it?

A. Well, I signed the checks, and went down and wrote up the accounts receivable, and became familiar with the business.

Q. And that is about all? A. Yes.

(Testimony of Eva M. Scharpf.)

Q. Did you, in consideration of that and in return for that, under the terms of the partnership agreement, give up an interest or a part of your interest to your husband; didn't you?

A. What do you mean, I gave up?

Q. Strike the question. Insofar as you are concerned, under the partnership arrangement, did you consider that you had as much of an interest in the business after 1941 as you had prior to that time?

A. I had a more active interest in it.

Q. Mrs. Scharpf, I hand you Petitioner's Exhibit 21. That is the letter of notification to the First National Bank of Eugene, which is in evidence in this case, and which relates to the authorization of the partners to borrow money from the bank. Isn't that correct? [156]

A. Yes.

Q. Did you ever at any time after the date of that instrument exercise any of the authority described or referred to therein, by borrowing from the bank for business purposes?

A. I think I signed notes, if that is what you mean.

The Court: What is the answer?

The Witness: I think I signed notes, if that is what you mean. I signed anything that had to be signed by myself. Who else signed the notes?

A. Mr. Rogers, Mr. Scharpf, and Mrs. Rogers.

Q. Is it your recollection that any sums were actually borrowed by the partnership for which notes were given after 1941?

A. Yes.

(Testimony of Eva M. Scharpf.)

Q. And to the extent that that occurred, it was handled in the way that you have described?

A. Yes.

Q. Mrs. Scharpf, am I correct in my understanding of the purport or the effect of your testimony, that as far as you are concerned, you did not consider or regard yourself as having given up or surrendered anything to your husband as a result of any interest that your husband acquired as a result of the partnership arrangement? A. No, sir.

Mr. Pigg: That's all. [157]

Mr. Davidson: That's all.

The Court: You may stand aside.

(Witness excused.)

The Court: Call the next witness.

Mr. Davidson: I will call Mr. Rodman.

Whereupon,

JAMES A. RODMAN

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. What is your name?

A. James A. Rodman.

Q. What is your business or occupation?

A. Real estate business.

Q. At what point? A. Eugene, Oregon.

(Testimony of James A. Rodman.)

Q. How long have you been in the real estate business there? A. 13 years.

Q. During your experience there have you handled the sale of or the rental of business properties in Eugene? A. Yes.

Q. To a large extent? [158]

A. Well, I have handled them as a broker, and I have also bought and sold property.

Q. Are you familiar with the values and rental rates of business property in Eugene, as of January 1, 1941? A. Yes.

Q. Are you familiar with the Eugene property of the Twin Oaks Builders Supply Company as existed on January 1, 1941?

A. Pretty much, so, yes.

Q. What would you say, based on your experience, would you consider to be a fair monthly rental for that property as of January 1, 1941?

A. I would have to base that on the general picture, because I know of no comparable site that was leased or sold in 1941.

Q. Do you think you could base it on your general knowledge? A. I think so.

Q. What would that be.

A. I would say \$150 a month, or at the top, \$175.

Q. Is that the property at Eugene?

A. Yes.

Q. Is that a general business property?

A. What do you mean?

(Testimony of James A. Rodman.)

Q. Perhaps I should say a general purpose property, as [159] a business property?

A. No, sir.

Q. Is it adaptable for anything but a lumber yard?

A. I would say that the highest and best purpose is the lumber business.

Q. Are you familiar with the property occupied by the Long-Bell Lumber Company in Eugene?

A. I have never been in the interior. I pass it every day and I have passed it every day for years. I live out beyond there.

Q. What would you say, in general as to the rental value of that property as it existed in 1943 or 1944, and how it compares with the rental value of the Twin Oaks Property as it existed in 1941?

Mr. Pigg: I object, Your Honor, because the witness has already said he is not familiar with the Long-Bell property.

The Court: If he knows. Do you know what the value was?

The Witness: I would say, from an exterior inspection——

The Court: Can you tell us or can you judge its rental value from what you saw?

The Witness: Well, I think so.

The Court: Answer the question, then, if you know. [160]

Q. (By Mr. Davidson): We want to know how they compare?

(Testimony of James A. Rodman.)

A. I would say that the other property, the McDonald property, would have a rental value of fifty per cent more than the Twin Oaks.

Q. By the McDonald property, you mean the property now occupied by the Long-Bell Lumber Company, formerly occupied by the McDonald brothers? A. Yes.

The Court: The witness who testified yesterday was from the Long-Bell Company?

Mr. Davidson: Yes.

The Court: And that is the property that you are comparing it with?

Mr. Davidson: Yes.

The Court: Is there anything further?

Mr. Davidson: That is all on direct.

The Court: You may cross-examine.

Cross-Examination

By Mr. Pigg:

Q. Mr. Rodman, how long did you say you had been familiar with the Twin Oaks property in Eugene?

A. Well, I have been familiar with it for about 15 years; ever since I have lived in Eugene.

Q. Can you testify as to any familiarity with any of the Twin Oaks properties in Junction City?

A. No, sir.

Q. The same is true with Cottage Grove?

A. Well, I do know something about the Cottage Grove property. I had another real estate office at Cottage Grove. My son was in charge of the opera-

(Testimony of James A. Rodman.)

tion in Cottage Grove, and the building down there was pointed out to me, which was a large building which they tried for two or three years to rent, through my office, but my son was unable to rent it.

Q. Were you in the court room this morning?

A. Yes.

Q. When Mr. Rogers testified? A. Yes.

Q. You did hear Mr. Rogers testify that the property that they owned in Cottage Grove was rented by various residents down there for storage purposes, didn't you? A. Yes.

Q. I believe you said, that in your opinion, about \$150 was the top or high rental value or fair rental for the Eugene property?

A. I said I thought \$150 would be a fair rental, with a maximum of \$175.

Q. That is a maximum of \$175, the Eugene property?

A. Yes, that is right. You are speaking as of 1941?

Q. 1941, January 1, 1941.

A. That is right. [162]

Q. Aside from your general familiarity with the property as you have described it, when, if ever did you make a detailed or personal inspection or examination of the properties for the purpose of arriving at your opinion as to rental value?

A. My visits there, generally speaking, have been for business, that is, to buy, purchase retail in

(Testimony of James A. Rodman.)

the yard, and my visits have made me quite familiar with the property.

Q. You didn't go in there on those occasions with any purpose in mind of reaching a conclusion as to a fair rental value of the property, did you?

A. No, I was never employed for that purpose. A man in my office has made an approximation of the—an appraisement of the ground there, but I didn't pay any attention to what the appraisement was.

Q. So you have never made a special study or examination to examine into the several factors that would be material to determine the fair rental value of the properties on that date, have you?

A. My knowledge of the property was sufficient to make a decent estimate on what the rentals were on that property in 1941. I have been acquainted with the properties all over town.

A. You said, I believe, it was not a general purpose property, but that its highest use or value was as a lumber [163] yard or business.

A. That is right. A good part of the buildings are buildings for purely piling of lumber, and nothing else.

Q. Of course, that was the purpose for which the Twin Oaks Company owned or possessed the property, is that not correct? A. I presume so.

Q. And according to your testimony then, they were devoting the property to its most useful purpose and advantageous purpose?

(Testimony of James A. Rodman.)

A. I would think it was used to its most useful purpose, yes.

Q. As a facility for the type or character of business that was being carried on by the Twin Oaks Company, do you know of any property in Eugene that would have been superior property for the same purpose?

A. Up until the highway crossed there, until they were in anticipation, those were probably the ideal spots for lumber yards, the McDonald Lumber Company and the Twin Oaks Company and three or four of them in a row—until that matter was injected into the picture, the cutting of the highway into the property, I think they were excellent locations for that business.

Q. What did you know as to any matter or possibility of cutting a new highway through, which would affect the value [164] of the property?

A. I was advised that the State Highway Commission had made surveys through there.

Q. You knew that? A. Yes.

Q. Did you appraise this Twin Oaks property in connection with thought of the use of the property for the highway?

A. No, sir. I was president of the Chamber of Commerce, and the master sheet was laid down where we could go through it; it was a matter of conjecture as to whether they would go straight through.

(Testimony of James A. Rodman.)

Q. How long have they been in the Chamber of Commerce, these master sheets.

A. Not in the Chamber of Commerce but in the State Highway Department where we can see them.

Q. How long have they been available?

A. Those were among the possibilities; no surveys had definitely been made.

Q. No surveys had definitely been made?

A. Not as a definite matter. They don't make them definitely in the first place.

Q. Do you know, of your own knowledge as to when, if ever, it became a certainty there would be a highway put through which would touch this property? [165]

A. It is a certainty from now on.

Q. When did it become a certainty?

A. I would say a year or two ago; some of them, and some of them were in Court where they condemned the property.

Q. Is it or is it not a fact that the highway, as now contemplated, will not touch any of the actual property or buildings of the Twin Oaks Company?

A. I am not sure whether it cuts across a little corner of it; that would not affect the value in 1941, would it?

Q. That is what I was going to ask you next. Based upon the information that you have concerning the possibility and the knowledge of the sketch with respect to cutting through the new highway, what effect, if any, in your opinion would that

(Testimony of James A. Rodman.)

have on the value of the property, the Eugene property, as of January 1, 1941?

A. If they had made the cuts on some spots where they anticipated, it would have destroyed it; but so far as the rental value that I am speaking of, I am speaking of \$150 without the influence of that action. Had that been effected in 1941, it would not have had any value for rental of any kind.

Q. If you had been called upon to determine the fair rental value of the property as of January 1, 1941, assuming it was vacant, at that time, how much weight would you [166] have given to the fact, in reaching your conclusion, that it was then not occupied?

A. You don't couch your question so that I can find out what you want to get at.

Mr. Pigg: Will you read the question?

(Whereupon the last question was read aloud by the reporter as above recorded.)

A. How much weight would I give to it had it been unoccupied at the time?

Q. Yes, how important is that factor?

A. I suppose I would have to proceed on the capitalization method to determine what would have been the use of the property, if put to its highest use, and what its value would have been, that is, the Twin Oaks yard—that is, what reasonably could be expected to be the return, whether it was vacant or not. However, we do not take into consideration such factors in renting property of this kind; what

(Testimony of James A. Rodman.)

you would rent it for would be largely a matter of dickering.

Q. If you were out there for the purpose of determining a fair rental value, would you or would you not have a prospective lessee.

A. I would have hoped that we could create a prospective lessee.

Q. Would you have assumed it? [167]

A. I might assume it, but it might be a violent assumption if I would undertake to do so.

Q. How much weight would you give to the factor that you think would be a violent assumption?

A. Let us suppose that you have five lumber yards or lumber companies that are serving the community reasonably well. Naturally there wouldn't be much use for the sixth. There are many factors that you have to give weight to.

Q. In reaching your conclusion of \$150 to \$175 per month rental value, did you or did you not assume that there was an owner or prospective lessor of this same property, or comparable properties, and that there was in existence at that time, also, one or more persons who was in the market to lease the property?

A. Mr. Pigg, I am doing the reasoning now; I didn't do it in 1941.

Q. Let me finish the question. I am asking you about 1941, of course, in the final analysis. But in this particular question I was asking you as to the method of reaching your conclusion?

(Testimony of James A. Rodman.)

A. Will you state the question again?

Mr. Pigg: I will strike the question.

The Court: All right, strike the question.

Mr. Pigg: I think I have an answer, anyway, in the [168] answers that the witness has given. That is all.

Mr. Davidson: That is all.

The Court: You may stand aside.

(Witness excused.)

The Court: Call your next witness.

Mr. Davidson: I will call Mr. Martin.

Whereupon,

B. A. MARTIN

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Will you state your name?

A. B. A. Martin.

Q. What is your business?

A. Locating engineer for the Oregon State Highway Commission.

Q. Have you worked on the location for the highway in the route near the Twin Oaks Builders Supply Company at Eugene, Oregon?

A. I have.

(Testimony of B. A. Martin.)

Q. Did you prepare a map of the tentative location? A. I did.

Mr. Davidson: I would like to have this marked for identification.

The Clerk: Petitioner's 35.

(The document referred to was marked as Petitioner's Exhibit No. 35 for Identification.)

Q. (By Mr. Davidson): I hand you here a blueprint map, marked for the purposes of identification as Petitioner's 35, and I will ask you to state what that map is.

A. This is a map, a sketch map of the proposed route through the City of Eugene, which is known as the Sixth Street route.

Q. When was that prepared?

A. This map was prepared in January 1940.

Q. Was it prepared by you or under your direction?

A. It was prepared under my direction.

Q. Whose name appears on it? A. Mine.

Q. Your name appears on it?

A. Yes, it does.

Q. Is the location of the property of the Twin Oaks, at that time, the Twin Oaks Builders Supply Company—shown on the map?

A. It is shown here in red.

Q. What, with reference to that property, is the location of the proposed highway? [170]

A. Well, the southbound traffic lane goes right through the center of the Twin Oaks property.

(Testimony of B. A. Martin.)

Q. What effect would the construction of that highway on that location have had on the use of the property for a building material yard?

A. Well, it would have destroyed it if it had been built.

Q. What was the status of that survey on January 1, 1941?

A. The plans were worked up, the plans and estimates were worked up and were being worked up at that time, and they were submitted sometime later, I would say, to the State Highway Engineer or the State Highway Commission.

Q. At that time, January 1, 1941, then these were either submitted or were in the process of submission, but had not been either accepted or rejected by the Highway Commission; is that right?

A. That is correct.

Q. Are you familiar with what was then the McDonald Lumber Company in Eugene?

A. I am.

Q. And where is that located on this map with reference to the Twin Oaks property?

A. It is to the north, between Fifth and Sixth Streets, on the east side of High Street.

Q. Were you on or around both of these properties in [171] or about January 1, 1941?

A. I was.

Q. Will you state to the Court your opinion as to the nature of the two properties as to their comparative acreage?

(Testimony of B. A. Martin.)

A. Well, just looking at the map, I think the Twin Oaks might have had a little more land than the McDonald. It shows on this map, and this map is drawn to scale—it shows that the Twin Oaks property has a little larger area than the McDonald Lumber Company. The McDonald Lumber Company, however, seems to have a little more frontage on High Street than the Twin Oaks Lumber Company.

The Court: High Street; is that a permanent thoroughfare there?

The Witness: Yes, it is the route to the east side of the Mackenzie River, on what is known as the Coburg Road.

Mr. Davidson: I offer Petitioner's 35 in evidence.

Mr. Pigg: No objection.

The Court: It will be admitted and marked as Petitioner's 35.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 35 for Identification, was received in evidence as Petitioner's Exhibit No. 35.)

Mr. Davidson: You may cross-examine.

Cross-Examination

By Mr. Pigg: [172]

Q. Mr. Martin, I will hand you Exhibit 35, which is the same map or drawing you were examined about a while ago, is it not?

A. That is right.

(Testimony of B. A. Martin.)

Q. I believe you refer to the south survey, or the southbound lane. Can you identify that?

A. It is this line here, which is the westerly line of the two lines Ninth Street to Sixth Street—from Sixth Street to Ninth Street.

Q. It is the line that goes through diagonally a part of the square that is marked in red, as you described a while ago, is it not?

A. That is right.

Q. Now, when this other survey north of that one was made, when was that? Do you know when that was made, Mr. Martin?

A. You mean north or east?

Q. Whichever one that was.

A. It is north here (indicating). That line—I don't know the definite dates on that—I was not around there from then on until after the war—for a while during the war.

Q. You didn't come back until the conclusion of the recent World War?

A. It was in 1945 or 1946. There was some study made in 1945, and I think there was some more in 1946. I don't [173] know when the acquisition of that right of way was started.

Q. When did you say the south one was drawn?

A. This survey was started in February 1, 1939. That was the relocation of the Pacific Highway through the City of Eugene, which is known as the Sixth Street route. This map was made January, 1940, which is a sketch map showing the proposed

(Testimony of Loy W. Rowling.)

Direct Examination

By Mr. Davidson:

Q. What is your name?

A. Loy W. Rowling.

Q. What is your occupation, business?

A. Vice-President of the First National Bank of Eugene, Oregon.

Q. Does the corporation, the Twin Oaks Company keep its account at the First National Bank at Eugene? A. It does.

Q. Does the Twin Oaks Builders Supply Company keep its account at your bank? A. Yes.

Q. Are those accounts kept separately?

A. They are.

Q. Do you have with you a copy of the signature authorization card of the Twin Oaks Builders Supply Company? A [179] partnership?

A. I have a copy, with affidavit attached, signed by the president of our bank, testifying that this is a copy of the signature card.

Q. Are you familiar with the original card?

A. I am.

Q. Is that a copy of it (indicating)?

A. It is.

Mr. Davidson: I would like to have it marked for identification.

The Clerk: Petitioner's 36.

(The document referred to was marked as Petitioner's Exhibit No. 36 for identification.)

(Testimony of Loy W. Rowling.)

Q. (By Mr. Davidson): I hand you a document which has been marked as Petitioner's 36.

Will you state what that is?

A. A copy of the original signature card carried in our bank for the account of Twin Oaks Builders Supply Company.

Q. Is that signature card a part of the original bank records? A. It is.

Mr. Davidson: I offer it.

Mr. Pigg: Is the original card in the court room?

The Witness: No, it is not. [180]

Mr. Pigg: I don't have any objection.

The Court: It will be admitted.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 35, was received in evidence as Petitioner's Exhibit No. 35.)

Q. (By Mr. Davidson): Will you tell the court from this card, who was authorized to sign those checks of that company?

A. L. C. Sharpf, E. V. Scharpf, John J. Rogers and Corabelle Rogers.

Q. Any one of the four?

A. Any one of the four.

Q. Do you have in your possession the records of the First National Bank relating to borrowings by the Twin Oaks Company, a corporation?

A. I have a copy of the liability ledger sheet which was started under date of December, 1940,

(Testimony of Loy W. Rowling.)

and carried down until March, 1942; I did not bring any more with me.

Q. What company's borrowings does that reflect?

A. In the main, it reflects the corporation.

The Court: Raise your voice, please.

The Witness: In the main, it reflects the borrowings of the corporation.

Q. (By Mr. Davidson): Does it reflect any relationship of the partnership [181] to that loan, on later entries?

A. Yes, it was on the renewal date; it was also signed by the partnership.

Q. What was the renewal date?

A. The renewal date was July 1, 1941.

Q. Does that indicate that the corporation remains as the principle obligor? A. It does.

Q. And that the partnership was a co-signer or endorser? A. They were a co-signer.

Q. What is the custom with the bank where there is a corporation indebtedness assumed by the partnership?

A. I am not on the discount committee, but I think we always try to get all the signatures we can.

Q. In other words, if you have any relationship, you continue that?

A. Yes; and this partnership was perfectly willing to supply that.

(Testimony of Loy W. Rowling.)

Q. Does this ledger sheet reflect any new borrowings by the partnership?

The Court: The ledger sheet, is that the exhibit which has just been identified?

Mr. Davidson: No; he is just testifying from that. That is the document from which he is testifying.

Mr. Pigg: I object to the question, and ask that it [182] be identified, so we will know what he is talking about.

The Court: Unless it is identified, you don't know what he is talking about. The reporter's notes won't show what he is talking about.

Mr. Pigg: It should be identified as to what he is talking about.

Mr. Davidson: Will you read the question as it referred to the ledger sheet, Mr. Reporter? I think, Your Honor, I asked him if he had in his possession any of the bank records, and he said he had, and then I asked him what the record showed. I think that is competent testimony.

The Court: If it is shown as identified, I didn't get that.

Mr. Pigg: That only makes the document itself admissible.

The Court: The document should be first identified, so there would be some way of identifying his testimony. In other words, it will be unintelligible when you read the stenographer's transcript unless the document is identified.

(Testimony of B. A. Martin.)

route. The details, plans and estimates were worked up on this route and submitted to the Highway Engineer—to the Highway Commission.

Q. Well, it is a fact, is it not, that the acquisition, or the matter of putting through the highway as it finally was determined upon, involved a three-way contract between the State of Oregon, the County of Lane and the City of Eugene?

A. That is correct.

Q. And that such a contract was not entered into or concluded until about November of 1946?

A. I think that is correct.

Q. And that is the first time it was actually known, or it could be said that it was known that the highway was being put through so far as the public was concerned?

A. The date that you are giving me there, November 1946, I don't know whether that is the date or not, but it was in that year that the city and the county and the state entered into an agreement. This is a study that was made previous to that agreement. [174]

Q. This is merely a study. You are not familiar with the actual consummation of any agreements or contracts between the three parties I have mentioned?

A. Well, I have read the contract, yes.

Q. Do you know whether it is dated November 1946 or some other month in 1946?

A. I don't know which month?

(Testimony of B. A. Martin.)

Q. But it was 1946? A. Yes.

Q. You are sure it was 1946?

A. Well, I wouldn't even be so sure as to say it was 1946. I know it was after the war, sometime between the end of the war and 1947.

Q. Anyway, it was finally determined, whichever year it was, that the highways, as shown by this map and chart in Exhibit 35 were the ones to be used? A. The one that was finally adopted.

Q. That is correct?

A. The plan is not on this map. This was made in 1940. We are talking about 1941. We just came to the edge of this property here (indicating), and then we swung to take the highway here (indicating) at the millrace.

The Court: By "this property," what do you mean?

The Witness: The Twin Oaks property. I think the line comes right at the edge of the Twin Oaks property; that [175] would be the northerly or the Sixth Street boundary of the Twin Oaks property. We swing to the south down or up the millrace, and we acquired right-of-way on both sides of the millrace. There is a piece of property which belongs to the Twin Oaks along on the west side of the millrace, which was acquired by the State Highway Commission. I couldn't tell you exactly from this map here, because this is nothing more than a sketch map drawn to scale.

(Testimony of B. A. Martin.)

Q. (By Mr. Pigg): This map shows the actual through? A. No, it does not.

Q. It does not? A. No.

Q. Was the survey which you have been describing along a curve there (indicating)?

A. Right there is a 12-degree curve.

The Court: Let us not go into the detail of the highway.

Q. (By Mr. Pigg): What is the fact as to whether the highway, as it is definitely decided to be put through, does or does not cut through any portion of the property of the Twin Oaks Companys? A. Will you state that question again?

Mr. Pigg: Will you read it, Mr. Reporter? [176]

(Whereupon the last question was read aloud by the reporter as above recorded.)

A. I don't understand the question that you asked.

The Court: Does it go through any part of the Twin Oaks property, the way it is going to be built?

The Witness: Yes; I know they have acquired right-of-way from the Twin Oaks Company, and they have also eliminated a spur track leading to their plant.

Q. (By Mr. Pigg): The Twin Oaks Company, was, of course, paid for any property that was acquired by the State Highway Commission, was it not? A. Certainly, Mr. Pigg.

Mr. Pigg: That is all.

(Testimony of B. A. Martin.)

Redirect Examination

By Mr. Davidson:

Q. Was the location of this survey made known to the public at or about the time it was made?

A. Yes.

Q. Was there any protest?

A. I could not say.

Q. This was, however, made public?

A. That plan was made public.

Q. At or about the time the map was made?

A. Yes. [177]

Mr. Davidson: That is all.

Mr. Pigg: That's all.

The Court: You may stand aside.

(Witness excused.)

The Court: The Court will take a recess until two o'clock this afternoon.

(Whereupon, at 12:30 p.m., a recess was taken until 2:00 p.m. of the same day.) [178]

Afternoon Session, 2:00 p.m.

The Court: Call your next witness, Mr. Davidson.

Mr. Davidson: I will call Mr. Rowling.

Whereupon,

LOY W. ROWLING

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

(Testimony of Loy W. Rowling.)

Mr. Davidson: All right. I will have it marked for identification.

The Clerk: Petitioner's 37 for identification.

(The document referred to was marked as
Petitioner's Exhibit No. 37 for identification.)

Q. (By Mr. Davidson): I hand you herewith a document marked for identification as Petitioner's 37. Will you state what that is?

A. The liability ledger sheet of the Twin Oaks Company.

Q. When did it start?

A. It started in December, 1940, and has continued on here, up until March 24, 1942.

Q. What company's borrowings does it reflect?

A. Originally, it reflected the borrowings of the corporation.

Q. Does it show any relationship to the partnership in the borrowings?

A. Yes, it shows that the partnership signed the note.

Q. What is the custom of the bank where the partnership succeeds the corporation, where the corporation is still in existence?

A. It is customary to get both signatures to the notes.

Q. Does the ledger show any borrowings by the partnership, as such?

A. I don't believe this one does.

Mr. Davidson: We offer this in evidence.

Mr. Pigg: No objection.

(Testimony of Loy W. Rowling.)

The Court: It will be admitted in evidence as Petitioner's 37. [184]

(The document referred to, heretofore marked as Petitioner's Exhibit No. 37 for identification, was received in evidence as Petitioner's Exhibit No. 37.)

Q. (By Mr. Davidson): Mr. Rowling, I show you Petitioner's 21, which has been introduced in evidence as the borrowing authorization continued for the partners of the Twin Oaks Builders Supply Company, which you will note is dated in 1944. Will you state whether, to your knowledge, there was any previous authorization?

A. Yes, I think that is the first authorization we have for the partnership.

Q. To your knowledge, did the bank make any loans to the partnership prior to this time?

A. Not to my knowledge.

Q. Would it be customary for the bank to require authorization, in the years 1941 to 1943, under your then existing practice, where the partnership was the endorser on the note?

A. No.

Q. In your experience with the bank, have you had any experience as to interest rates on purchase contracts covering various kinds of property?

A. Well, I have been in the bank 31 years, and naturally I have gone through most of the departments; and it has been my observation that contracts of this nature are usually at [185] a lower

(Testimony of Loy W. Rowling.)

rate than the going bank interest rates.

Q. Is there any standard rate for such a contract? A. I don't know of any.

Mr. Davidson: That is all.

Cross-Examination

By Mr. Pigg:

Q. Mr. Rowling, I hand you again Petitioner's 37. Do I correctly understand that on this exhibit there appears the continuation of a loan existing by the bank to the corporation, the Twin Oaks Builders Supply Company, on December 31, 1940, that was later, thereafter, renewed or substituted for a loan by the partnership?

A. Renewal, yes.

Q. How much was that loan?

A. On December 31, 1940—\$20,250; January, 1941, a \$4000 payment, which reduced the loan to \$16,250 and that note was renewed in July, 1941, for \$16,250.

Q. And the obligor was the corporation?

A. Yes.

Q. Does that also show it was signed in the partnership's name, or in the name of the individuals?

A. It was signed in the partnership's name.

Q. By one of the partners?

A. I could not say as to that.

Q. Then you don't know who signed it? [186]

A. No.

Q. You don't know whether it was signed by either Mrs. Rogers or Mrs. Scharpf, do you?

(Testimony of Loy W. Rowling.)

A. There is nothing here to indicate who signed it.

Q. You don't know whether it was signed by Mr. Rogers or Mr. Scharpf? A. No, I don't.

Q. Isn't it customary under such circumstances and under the manner in which banking business is carried on and conducted, upon receipt of a notification similar to Petitioner's 21, which I hand you, that, as a matter of general practice, the bank would require signatures of any persons purporting to be partners under those notes?

A. Yes; although this corporation—although this note was originally the corporation's note, the additional signatures put on there simply as additional signatures or endorsers.

Q. You knew at the time the note was renewed that the corporation had transferred its current assets to the partnership? A. Yes.

Q. Were you familiar with the transactions, in general, or did you become familiar with it in connection with the renewal of the note?

A. I don't know how we became familiar with it, other [187] than that we had a letter from the company, January 1, 1941, stating it was to be a partnership.

Q. Is Exhibit 21 the letter that you referred to?

A. No, it is not. I have a letter in my file from Mr. Rogers. I don't seem to find it. I thought I had one here. I don't seem to locate it right now. We had a letter. I cannot find it. It was dated

(Testimony of Loy W. Rowling.)

January 15, 1942, signed by Mr. Rogers, "We hand you herewith the combined financial statement of the Twin Oaks Builders Supply Company."

Mr. Pigg: I move to strike that as not responsive.

Q. (By Mr. Pigg): Does that relate to the same subject matter as Petitioner's 21?

A. It relates in this way, that it gives us notice that there is also a partnership and a corporation.

Q. When was that, Mr. Rowling?

A. January, 1942.

Q. When did you first become aware, or when were you first put on notice there was a partnership?

A. In the early part of January, 1941.

The Court: Is there any exhibit in relation to that?

Mr. Davidson: Where is the signature card?

The Witness: That would be notice.

Mr. Davidson: The signature card on Petitioner's [188] 36 is dated January 2, 1941.

The Witness: I also had a letter, and I don't seem to be able to locate it.

Q. (By Mr. Pigg): Now, as an officer of the First National Bank—the Eugene branch of the First National Bank——

A. Not a branch.

Q. Is it a separate institution?

A. That is right.

Q. And being put on notice that the assets had been transferred, as they were in this case from the corporation to the former stockholders and their

(Testimony of Loy W. Rowling.)

husbands and wives, what is the practice as to whether or not the bank, in the conduct of its business, would have required the signatures of both the wives and their husbands on a renewal note?

A. What is the fact?

Q. Yes.

A. As I say, I am not a member of the loan committee; I think they considered it was a corporation loan, since there was a close affiliation between the two, and they had the partnership sign, too.

Q. Before January, 1941, you knew the corporation was carrying on the business of lumber and building supply?

A. The nature of the business before the partnership?

Q. That's right? [189]

A. That is correct.

Q. After January 1, 1941, you knew that the corporation was not doing it?

A. We apparently knew there was a change in the setup.

Q. And it was the husbands and wives to whom the current assets of the corporation had been transferred, who were carrying on the business?

A. We probably knew that the partnership was carrying on the business, but the corporation still owned the real estate.

Q. With respect to Exhibit 37, was that a secured or an unsecured loan?

A. An unsecured loan.

(Testimony of Loy W. Rowling.)

Q. An unsecured loan? A. Yes.

Q. Wouldn't that be regarded as a commercial loan, or otherwise?

A. The original note was probably regarded as a commercial loan.

Q. What was the difference as to how it was considered originally and when it was renewed in 1941?

A. Well, I suspect the bank had sufficient faith and confidence in the firm to continue it that way.

Q. By "the firm," you mean the individuals or the corporation? [190]

A. The whole picture.

Q. The whole setup? A. Yes.

Q. In other words, when the note was renewed, you were relying on the assets available and the earning capacity available of the business, as a whole; is that correct, as a unit?

A. The discount committee felt that the partnership should sign the note also; that is all they did.

Q. That would be the normal course of events?

A. That is right.

Q. Referring again to Exhibit No. 37, Mr. Rowling, what was the rate of interest on that loan?

A. It was six per cent up until July 14, 1941, and then it was five per cent.

Q. Do you know any reason why the interest rate, the prevailing interest rate, in Eugene in the early part of 1941, for commercial loans of that

(Testimony of Loy W. Rowling.)

type, should have been less than six per cent, as you charged in this case.

A. Well, competition regulates the interest rate a good deal.

Q. And with that competition, you charged six per cent at that time?

A. Yes, we were able to do that.

Q. And did your bank have notice as to the manner in which the partnership arrangement was made and the nature of [191] the assets, and any notes that were given in that transaction, if any?

A. At the time of the change?

Q. Yes.

A. I don't have any records to that effect. They may have had. There is nothing here that I can find to show it. It was the custom in the days before we were affiliated with the First National, to verify at the recorder's office in the County, to find out whether the assumed business name had been filed, but we never required it in our files until we became affiliated with the First National Bank of Portland.

Q. Assuming that in connection with the transaction in which the partnership was organized or set up in January, 1941, if there were current assets of the corporation, accounts receivable and cash, delivery equipment, and so forth, representing the value of those assets, and the excess of the value of those assets over the liabilities assumed by the arrangement amounted to \$89,000, and that unsecured

(Testimony of Loy W. Rowling.)

note was given by the partners of the corporation for the payment or liquidation of that note for a period of one year, would or would not the prevailing rate of interest, six per cent, or less than six per cent?

A. You mean the loan from the bank?

Q. Of the type I have just described?

A. Borrowing it from the bank? [192]

Q. Yes. A. It probably would have been.

Mr. Pigg: That's all.

Mr. Davidson: That's all.

The Court: You may stand aside.

(Witness excused.)

The Court: Call your next witness.

Mr. Davidson: Mrs. Mignon Carmichael.

Whereupon,

MIGNON CARMICHAEL

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Davidson:

Q. Will you state your name?

A. Mignon Carmichael.

Q. What is your occupation?

A. I am bookkeeper for the Twin Oaks Builders Supply Company and the Twin Oaks Company.

Q. You keep the books both for the corporation and the partnership? A. Yes.

(Testimony of Mignon Carmichael.)

Q. Are you familiar with the character of those books? A. Yes. [193]

Q. Do you work on them right along?

A. Yes.

Q. Will you state if separate accounts are kept for the corporation and the partnership?

A. Yes.

The Court: How long have you been working there?

The Witness: Since August, 1943. I went in as assistant bookkeeper at that time.

Q. (By Mr. Davidson): Do the books show since what period they have been kept separately?

A. Since 1941.

Q. And have you, since you have been there—since what time in 1941?

A. January 2, I believe that would be.

Q. Do you do the banking for both corporations?

A. Yes; that is, I oversee it; I have girls working under me, and they take it to the bank for me, but I oversee it.

Q. Are they deposited in separate accounts?

A. Yes.

Q. Do the records show how long the separate accounts have been maintained?

Mr. Pigg: I submit the records, themselves, are the best evidence. [194]

Mr. Davidson: We have the ledger sheets.

Mr. Pigg: Are they in court?

(Testimony of Mignon Carmichael.)

The Court: I think we should shorten it, if possible.

Q. (By Mr. Davidson): Do the bank accounts show for what period they have been maintained separately?

A. Since January 2, 1941.

Q. What inter-company transactions are there between the corporation and the partnership?

The Court: As shown by the books.

Q. (By Mr. Davidson): As shown by the books of the company?

A. I don't know if I understand you exactly.

Q. Does the partnership make any payments to the corporation, as shown by the books?

A. They pay the rentals.

Q. Do the books show any payments by the corporation to the partnership?

A. They pay for the keeping of the books.

Q. How is that payment made?

A. Annually.

Q. How much annually? A. \$300.

Q. And do the books show that has been the regular payment [195] since the inception?

The Court: \$300 annually?

The Witness: Annually.

Mr. Davidson: You may cross-examine.

Cross-Examination

By Mr. Pigg:

Q. Is it the corporation that pays the partner-

(Testimony of Mignon Carmichael.)

ship \$300 or does the partnership pay the corporation?

A. The Corporation pays the partnership \$300 annually for keeping the books.

Q. For Bookkeeping service?

A. For my work and the auditing of the books at the end of the year.

Q. You came to the Twin Oaks Company, so far as your bookkeeping capacity was concerned, in August of 1943?

A. Yes; as assistant.

Mr. Pigg: That is all.

Redirect Examination

By Mr. Davidson:

Q. Just one more question. Have you handled the receipt books of any payments from the partnership to the corporation? A. Yes.

in the corporation's bank account? A. Yes.

Mr. Davidson.

That is all.

Mr. Pigg: No questions.

The Court: You may stand aside.

(Witness excused.)

The Court: Call the next witness.

Mr. Davidson: Your Honor, we have a few documents that we would like to offer in evidence. I would like to have this marked for identification (indicating).

The Clerk: Petitioner's 38.

(The document referred to was marked as Petitioner's Exhibit No. 38 for identification.)

Mr. Davidson: We offer as Petitioner's 38 the revenue agent's report, with transmittal letters addressed to Louis C. Scharpf and Eva M. Scharpf for the year 1943, showing deficiencies assessed against Mr. Scharpf and an over assessment for Mrs. Scharpf.

The Court: Who is it from?

Mr. Davidson: From Seth R. Stockton, revenue agent in charge.

Mr. Pigg: That is immaterial. It only shows a recommendation by the revenue agent in charge and is not a determination by the Commissioner.

Mr. Davidson: It is an official act of an agent of the government in charge of those things.

Mr. Pigg: It does not become an official act until [197] it is approved by the Commissioner.

The Court: What does it show?

Mr. Davidson: It contains all these reports, and shows that the revenue agent in charge is recommending that the status of Mrs. Scharpf as a partner be disallowed, and that the entire income of Mr. and Mrs. Scharpf from the partnership be taxed to Mr. Scharpf.

The Court: I don't think it would be necessarily binding on the Commissioner. I do know what probative force it would have. It will be admitted as Exhibit 38.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 38 for

identification was received in evidence as Petitioner's Exhibit No. 38.)

Mr. Pigg: I have no objection insofar as it is consistent with any determination that the Commissioner may have made.

Mr. Davidson: I would also like to have this marked for identification (indicating document).

The Clerk: Petitioner's 39.

(The document referred to was marked as Petitioner's Exhibit No. 39 for identification.)

Mr. Davidson: We offer the same type of exhibit for the year 1943 for Mr. and Mrs. Rogers.

Mr. Pigg: The same objection.

The Court: The same ruling; it will be received as Petitioner's 39.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 39 for identification, was received in evidence as Petitioner's Exhibit No. 39.)

(The document referred to was marked as Petitioner's Exhibit No. 40 for identification.)

Mr. Davidson: We offer the same type of report covering the Twin Oaks Builders Supply Company, a partnership, for the years 1942 and 1943, showing no assessment of income, but a reallocation between the partners.

Mr. Pigg: Same objection.

The Court: It will be admitted and marked as Petitioner's Exhibit 40.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 40 for identification, was received in evidence as Petitioner's Exhibit No. 40.)

Mr. Davidson: Will you mark this?

The Clerk: Petitioner's 41.

The Court: What is it?

Mr. Davidson: Petitioner's Exhibit 41 is a certificate of the Collector of Internal Revenue, showing payments of income tax of Louis C. Scharpf for the years 1943 and 1944. I offer that in evidence.

Mr. Pigg: No objection.

The Court: It will be admitted as Petitioner's 41. [199]

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 41.)

Mr. Davidson: I also have here a deficiency notice addressed to John J. Rogers for the years 1943 and 1944, which I would like to have marked for identification.

The Clerk: Petitioner's 42.

The Court: What is that, now?

Mr. Davidson: The deficiency notice addressed to Mr. John J. Rogers, for the years 1943 and 1944. I offer that in evidence.

Mr. Pigg: No objection.

The Court: It will be received and marked as Petitioner's 42.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 42.)

Mr. Davidson: And also the deficiency notice addressed to Louis C. Scharpf, covering the same years, 1943 and 1944.

The Clerk: Petitioner's 43.

(The document referred to was marked as Petitioner's Exhibit No. 43 for identification.)

Mr. Davidson: We offer Petitioner's 43, the deficiency notice addressed by the Respondent to Louis C. Scharpf covering the years 1943 and 1944.

Mr. Pigg: We object to it as immaterial. [200]

The Court: It will be received and marked as Petitioner's 43.

(The document referred to, heretofore marked as Petitioner's Exhibit No. 43 for identification, was received in evidence as Petitioner's Exhibit No. 43.)

Mr. Davidson: I offer as Petitioner's 44, the certificate of the Collector of Internal Revenue showing payments of income tax by John J. Rogers for the years 1943 and 1944.

Mr. Pigg: No objection.

The Court: It will be received and marked as Petitioner's 44.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 44.)

Mr. Davidson: Your Honor, that completes the Petitioner's case, except that we had another witness on evaluations, Mr. Peterson of Eugene, and counsel for the Respondent has agreed to stipulate that, if called, Mr. Peterson would be qualified to testify and would testify that, in his opinion, a reasonable rental value of the Twin Oaks Property in Eugene at January 2, 1941, would be from \$185 to \$210 per month, and that he based that opinion upon a rental of sixty dollars for the concrete building, and rental of \$125 to \$150 for the balance of the property, and that otherwise on the direct examination and cross-examination, his testimony would [201] be the same as that of Mr. Rodman, who testified.

The Court: Is it stipulated by Respondent that the witness would so testify?

Mr. Pigg: Yes.

The Court: We will consider his testimony then, as though he were present?

Mr. Pigg: That is right; it may be so considered.

Mr. Davidson: The Petitioner rests.

The Court: The Respondent may proceed.

Mr. Pigg: Mr. Hyde.

Whereupon,

CLARENCE F. HYDE

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

(Testimony of Clarence F. Hyde.)

Direct Examination

By Mr. Pigg:

Q. Will you state your name?

A. Clarence F. Hyde.

Q. What is your business or occupation, Mr. Hyde?

A. I am a realtor and appraiser.

Q. Where?

A. In Eugene.

Q. Eugene, Oregon?

A. Yes. [202]

Q. How long have you been engaged in that business or profession there?

A. I have been an operator in the real estate business since 1920; I have been devoting a large portion of my time to appraising since 1933. At the present time, I am devoting about 30 per cent—about 80 per cent of my time to appraisal.

Q. Prior to your engaging in that business, did you pursue any collegiate or other courses of study to qualify you particularly or to better qualify you for that work?

A. I took a course of instruction with American Institute of Real Estate Appraisers, and have the designation of a member of the Appraisers' Society, that is, I am a member of the Society of Real Estate Appraisers.

Q. What collegiate degrees, if any, do you hold?

A. I have no collegiate degrees; I have three years of college work.

Q. Are you a member of any professional society?

A. The American Institute of Real Estate Ap-

(Testimony of Clarence F. Hyde.)

praisers; and the Society of Residential Appraisers.

Q. In your apprasial work and your brokerage work, as you have described it, is it necessary that you make examinations and investigations and studies of real estate property for the purpose of reaching a conclusion as to the fair market values of the properties at a given date? A. Yes.

Q. And that in such cases the fair market value is what you refer to as the value for sale?

A. Yes.

Q. Or income purposes?

A. Yes, that is one of the things that is arrived at.

Q. In arriving at a fair rental value for real estate, would the process for reaching a conclusion as to the fair rental value take into account the same factors and considerations?

A. The same factors are taken into consideration. The rentals of comparable properties and the depreciated values of the subject property and comparable properties as well.

Q. And would you proceed in that manner for the purpose of arriving at the fair rental value of a property—real property—commercial or business property—for purposes which contemplate a lease of property for a period of one year, or from year to year thereafter until notice by one or the other of the parties of termination, as of January 1, 1941?

A. Yes.

(Testimony of Clarence F. Hyde.)

Q. Are you familiar with the business properties or any other real properties owned by the Twin Oaks Company or the Twin Oaks Builders Supply Company of Eugene, Oregon, as of January 1, 1941?

A. You say, am I familiar with the properties which they owned as of that date? [204]

Q. Yes? A. Yes.

Q. Are you still familiar with them?

A. Yes.

Q. Do you have any general familiarity with, or did you have any familiarity with them prior to January 1, 1941?

A. As a customer of the store on some different occasions I have made some purchases of the company, and passing by there several times a week during a number of years, I became familiar with them.

Q. In that way you have gained a general knowledge, such as you have mentioned?

A. Yes.

Q. Now, are you familiar with the properties which either of the companies mentioned owned in Junction City and Cottage Grove, Oregon?

A. Yes, I am acquainted with those.

Q. Also as of January 1, 1941? A. Yes.

Q. Mr. Hyde, I hand you Petitioner's Exhibit 17, which is the lease agreement, or a copy of it, to which I referred a while ago. Have you been furnished with a copy of that lease heretofore?

(Testimony of Clarence F. Hyde.)

A. Yes.

Q. And this is the same as the one you have a copy of? [205]

A. Yes.

Q. Now, have you made an independent search or examination of the public records or any other recognized records for the purpose of ascertaining what properties were owned by the Twin Oaks Builders Supply Company as of January 1, 1941, or January 2, 1941?

A. Yes.

Q. Have you prepared a list or a chart of such properties?

A. I have.

Q. Do you have it with you?

A. Yes.

Q. Will you let me see the list or chart which you have there (indicating)?

A. Surely.

Mr. Pigg: I will ask that it be marked for identification as a Respondent Exhibit.

The Clerk: Respondent's Exhibit D.

(The document referred to was marked as Respondent's Exhibit D for identification.)

Q. (By Mr. Pigg): Mr. Hyde, I will return to you now the same group of papers which you handed me, which have now been marked for identification as Respondent's D. Can you designate or identify by page number in the chart which you have drawn or made showing the location of the Twin Oaks property or other [206] identification including the pictures, or otherwise?

A. Yes.

Q. Will you do so?

A. Well, the plat of the real property in Cottage Grove is on page 1; the picture of the building is on page 2.

(Testimony of Clarence F. Hyde.)

Q. Is that the Cottage Grove property?

A. That is Cottage Grove. And Junction City, the plat of the land is on page 5, and the pictures cover pages 6, 7 and 8. The main property on Eugene is on page 13, and the pictures on pages 14, 15, 16 and 17.

Q. And are there attached to the group of papers, now Exhibit D for identification, certified copies of deeds and conveyances relating to those particular properties? A. Yes, there is.

Mr. Pigg: We will also ask that this deed, this certified copy of a deed be marked for identification as Respondent's E.

(The document referred to was marked Respondent's Exhibit E for identification.)

The Court: Is that all attached to Respondent's D?

Mr. Pigg: That is right.

The Court: They are all under one cover?

Mr. Pigg: They are presently under one staple; and the next one, also a certified copy of a warranty deed, I will ask be marked as Respondent's F.

(The document referred to was marked Respondent's Exhibit F for identification.) [207]

The Court: Is there any objection to the introduction of these?

Mr. Davidson: There is no objection to the deeds. I assume they are what they purport to be, but I do

(Testimony of Clarence F. Hyde.)

object to the rest of the offer, and I am referring particularly to this group of papers and pictures.

The Court: He is not offering Respondent's D yet; that has just simply been identified.

Mr. Davidson: Yes, so I understand.

Mr. Pigg: And the next one I ask be marked as Exhibit G.

(The document referred to was marked as Respondent's Exhibit G for identification.)

Q. (By Mr. Pigg): Mr. Hyde, when were the photographs that you have identified in this exhibit for identification made, and by whom?

A. They were made by myself during the past ten days.

Q. To what extent, if you know, do the photographs that you have identified, insofar as buildings are concerned, disclose a picture of a building, or whatever it was, as it existed on January 1, 1941?

A. One of the pictures of the property at Sixth and High Streets shows a building back of which street there was constructed a building since that date. It is not very plain [208] in view of the building; but there was a building destroyed by fire in 1946, and a new building placed in front of it.

Q. Will you identify that by page number and by picture also?

A. It is shown on page 16; it is the frame building in the rear of the building which has the sign on it "Twin Oaks Builders Supply Company."

(Testimony of Clarence F. Hyde.)

Q. Are you familiar with the properties which you have described as they stood or existed on January 1, 1941? A. Yes.

Q. Now have you made a study and analysis of the pertinent facts in this case for the purpose of arriving at an opinion as to the fair rental value of these properties that you have described as of January 1, 1941?

A. Well, the only exception is one property that I didn't make a very complete investigation of, and that was the Cottage Grove warehouse property, which was locked; and I did not see the inside of it. But I did make inquiries of the tenants of what it was like on the inside.

Q. I used the phrase of "fair market" or "rental" value. What did you understand by those words?

A. A fair market value is the amount which a willing purchaser is willing to pay for a given amount of property or a certain amount of property, with a willing seller who is willing to sell, both of full knowledge of all conditions [209] applicable to the property, and neither the buyer having to buy or the seller having to sell.

Q. For the purpose of arriving at a fair rental value of a given property at a basic or given date, the same considerations or factors are true, are they not?

A. The same factors are considered.

Q. Based on your study and survey, and in the

(Testimony of Clarence F. Hyde.)

light of the experience that you have related, have you arrived at an opinion as to the fair market value of these properties—fair rental value of the properties as of January 1, 1941? A. Yes, sir.

Q. Will you state what that fair rental value is?

A. \$6700.

Q. What is that? A. \$6700.

The Court: What year?

The Witness: As of January 1, 1941.

The Court: For what period?

The Witness: For one year; for the calendar year 1941.

Q. (By Mr. Pigg): Does that include the real properties only, or the real property and furniture and fixtures?

A. This includes all the real property that they own, but not the fixtures or furniture; and it also includes the [210] building in another part of the city which was owned, and on which I think they did not own the land.

Q. Now, Mr. Hyde, will you explain in your own words just how you arrived at that value?

A. The Cottage Grove property consists of tracts of land approximately 170 feet in length and 105 feet in depth, and another vacant lot which is facing Ninth Street, which was the Pacific Highway, with a 45 foot frontage, with approximately 100 feet in depth; and there is a warehouse building 85 by 88. This warehouse building has a full basement, and one story above the basement. Upon inquiry *I informed*

(Testimony of Clarence F. Hyde.)

that this was a strong and substantial building, and about one half of it had a concrete floor. The fact that that building was rented, according to the information I received, during the years 1941—very little of it in 1940—and during the year 1941, 1942, 1943, 1944, and during that period the average rent amounted to, according to the figures I was furnished, at the courtesy of Mr. Rogers, was \$1054. So I estimated the fair rental value for the property for the year 1941 at \$950.

For the Junction City property, I made considerable inquiry as to other rentals in Junction City, and considered the property which the Twin Oaks Builders Supply Company was renting—the property that they are renting is on Sixth and Front Streets—that is a building with 50 foot frontage [211] and 74 feet in depth. It is a one-story store building. Now, immediately adjoining that property, on land which the company does not own, there was constructed upon it a hollow tile building. This hollow tile building is 50 feet wide and adjoins the building which they own and has a depth of 34 feet with 15 feet height. There is a string of windows across the top of the building, at both the east and west ends, about 30 inches wide on each side. That building has a cement floor, with the exception of two spaces for drivers of 27 feet each for cars. And in that building—that is a property that has 700 square feet of floor space. Considering the cost of that property as of the present time, and the value

(Testimony of Clarence F. Hyde.)

as of 1941, which is 56.4 per cent of the cost as of April 1, 1941, and allowing 25 per cent depreciation, there would be a value as of the present time of \$2200 for that building. That building adjoins the building which they are now using, which they are renting, and has a ground floor space of over fifty per cent of the store space; in addition to that, over 700 square feet of balcony space. I estimated the rental value of that to be, what they are paying for the store property, and the store property is comparable with other land—I considered that to be \$25 per month, or \$300 per year.

Immediately to the north of that, *there two* and three fourths city lots; the lots are 50 x 100 each, with [212] 137½ feet of paving on Front Street, and 100 feet on Seventh Street; that tract of land is enclosed by a six-foot woven wire fence, with three barbed wires above, and is improved with a building for the storage of lumber. The main building is a hollow tile at each end with an average height of ten feet, 40 x 90, with a total 3800 square feet. There is another storage shed 20 x 68 with an average height of ten feet, and a total 5160 square feet.

I considered that that property, being used to its highest use for the benefit of the lumber company, and in taking into consideration the comparable rents at Junction City I estimated the rental value of that property to be \$25 per year—\$25 per month—or a total rental for the Junction City property altogether of \$600 per year.

(Testimony of Clarence F. Hyde.)

There is one property in the City of Eugene which was located out on Charleston Street, on lot 3, block 5 of Skinner's addition, on land which is owned by the Oregon Electric Railway Company, which is leased land. The improvements in that building or on that tract of land, that belongs to the Twin Oaks Company, and consists of a building, a concrete building 32 x 100. The west side of the building is concrete, but the east side of the building is open, and it has a tar roof. Immediately adjoining that is a frame building which is 32 feet at one end and 8 feet at the other end; the difference in width being due to the railroad spur that runs into it. [213] That building is 40 feet in length. In addition to that improvement, there are four open coal bins, 25 feet wide, 40 feet in length, 6 feet high. The assessed value for tax purposes for that improvement is \$750 and the tax during 1941 was \$31.11. Upon inquiry, I found that that property was sold in January, 1948, and is now being operated by other ownership.

During the years 1941 to 1944, it was operated as a fuel business by the Twin Oaks Company. In consideration of that property with other rentals I estimated the rental value of that improvement to be \$25 per month, or \$300 per year.

I was informed that the property was sold for \$3500, but that was not verified.

Now, the main properties which heretofore have been discussed in particular have been the properties on which the main business of the company

(Testimony of Clarence F. Hyde.)

has been conducted, and the property is owned by the corporation, and was owned on January 1, 1941. That consists of lots: No. 2, the east 40 feet of lot No. 3, lot 6, and the north 5 feet of lot 7; all of plot 18; in the original plot of Lane County, Oregon.

On Lot No. 2, at the corner of Sixth Street and High Street is a heavily constructed cement building 34x50 feet, with a full basement. There are two stories above the basement, with a ceiling height of approximately 8 feet. This building is improved with a freight elevator. I did not [214] learn or verify the capacity of this elevator, but from my observation I am of the opinion that it was one and one-half tons, or in excess of that amount. This cement building has an advantage in being contiguous to other property owned by the company, so far as trackage is concerned, and is quite comparable to a building *located Fourth and Lincoln Streets* operated by the Eugene Mill Supply Company. That property of the Eugene Mill Supply Company was leased in 1941 for \$235 per month. That property is now renting at \$400 per month. That building is a warehouse property with a space for one car on the railroad spur. The rent of \$235 is less than the owner received in 1940; at that time it rented for \$275. That means an average rental of 17c per square foot. On that basis, for this concrete building, 17c per square foot for the storage space available in the building, it would amount to \$867, which I would consider as the rental value of that property

(Testimony of Clarence F. Hyde.)

for the calendar year. Now, this cement building, as I already stated, has a full cement basement and two stories. The cost of that building as of the present date and for the two stories is, in my opinion, \$4.24 per square foot. And the construction cost at this date for the basement \$2.68 per square foot, or a reconstruction cost at the present time of \$1.972. The current costs of 1941 were 56.4 per cent of the 1948 costs, which would reduce that building to the value of the building as of January 1, 1941, to about \$10,700. [215]

I estimated the depreciation on that building from that date of 30 per cent, as a lawfully depreciated value of a two-story basement and building, \$7490; and the depreciated value of the elevator as of that date was \$1279. Therefore there would be a total depreciated value of that equipment of \$769 to that building on the basis of the depreciated value of the improvements; and, also, in comparing it with the rent of like property, I based the rent at \$867 per year.

Now, immediately adjoining this cement building was a storage shed which was approximately—the storage shed was approximately 40x95. That building was lost by fire in 1945 or 1946 but was replaced with a new building in 1946. Mr. Rogers also informed that the fire loss on that building was \$7422. Now, if we were going to use the rule of thumb of \$10 per month for each \$1000, assuming it was worth what I have indicated, that would result in a rent

(Testimony of Clarence F. Hyde.)

of \$888 per year. But I think that might be excessive; so, for the purpose of this appraisal, I estimated the value of that building for storage space to be on the basis of one cent per square foot per month, or \$38 per month, with an annual rental of \$456.

Now, the main building of the Twin Oaks Company covers the west 145 feet of lot 6 and the north 5 feet of lot 7. So that that building has 85 foot frontage on High Street which is the main thoroughfare of that trade area, with a depth of 145 feet, having a railroad spur which is on [216] the property owned by the Twin Oaks Company. The west 30 feet of this building is used for an office and a retail store, and the east 115 feet is used for storage. So, I consider those two sections of the building separately. The 30 foot wide by 80 feet on the street is the store property, and has an area of 2550 square feet. Taking into consideration the rental of some other stores, which have narrower frontages in somewhat similar locations, for instance, the Maytag washing machine store or the Singer sewing machine store, or the Hub clothing store which have 20 foot frontage and 80 feet in depth—they were paying from 5 to 6 cents per square foot for rental, where they had the twenty foot frontage of store space.

In appraisal work, it is generally pretty well conceded that the front 30 feet of a store has a rental value of 54 per cent of the value of the store building which is 80 feet in depth; therefore I have as-

(Testimony of Clarence F. Hyde.)

signed in my opinion, that this property with an 85 foot frontage and a 30 foot depth at a rental value at that time 5 cents a square foot, or \$127.50 per month or an annual rental of \$1530.

Now, the storage part in connection with that same building, 85x115, has a minimum height of 20 feet and an average height of probably 22½ feet, and covers an area of 9775 square feet. There is one section of that, in the northwest corner, which is 30x30—that is a building which is enclosed, which is a room by itself, and is used for the [217] storage of small equipment, such things as hammers, hammer handles, and articles of that kind.

On the south side of the storage building there are two platforms, and adjoining them each is a space set off by partitions for the storage of building materials, and is used for the storage of lumber, because of its height and lumber can stand on end. Approximately one half of this building, of this 5775 square foot of building, has a concrete floor. For comparable purposes, the Northwest Flax Products Company owns——

The Court: I don't think we need to go into what these other people own. Let us not go too far afield.

The Witness: Without going into comparable properties, I estimated the rental value of this storage space to be at 8 cents per square foot, 8 cents per square foot per year, or \$1760.

Now, in addition to that space, the company owned on January 1, 1941, open land used for the storage

(Testimony of Clarence F. Hyde.)

of building materials, 8740 square feet, besides the railroad trackage, and I considered the value of that as comparable to the McCormack property which was bought by them for that same purpose, and I assumed the rental value of that as \$240 per year. I did not appraise the personal property, but in summing up the real property in Eugene, on High Street, the main plant has an assessed value, or did have in 1941 of \$6355. And I assumed the rental value of the entire property owned by the company [218] in 1941 as having a rental value of \$6700.

Q. Are you finished?

A. Yes, unless you want some more detail.

Q. Can you state briefly the nature of the principal appraisal work in which you were engaged, or in which you have engaged for governmental agencies or state agencies?

A. I did the appraising for the First National Bank, the United States National Bank at Eugene, and at Springfield, at Cottage Grove, and had conferences in connection with the government-insured G.I. loans, and have done some work for the United States National Bank, for the Bank itself, and I did appraising for Veterans Department of the State of Oregon on their loans that they are making to soldiers, which covers residential, farm and business property. The same thing is true on government loans. I have made appraisals for the California Insurance Commissioner of the largest pri-

(Testimony of Clarence F. Hyde.)

vate-owned property in Eugene, on which the insurance companies had liens. I have made appraisals for E. E. McKeen of the Connecticut Mutual Life Insurance Company, and for the Kaufman Mortgage Company. I have done considerable work for the Oregon State Highway Department on condemnation proceedings.

Q. Are you familiar with the Long-Bell properties in Eugene, used by the Long-Bell Company for their lumber yard or business?

A. Yes, I am familiar with that. [219]

Q. To what extent, if at all, do the Long-Bell Properties compare as a business facility with that of the Twin Oaks Company in Eugene?

A. In many ways they are very similar. They both have railroad trackage on the spur; they both have storage space. The Long-Bell lumber company facility is not quite as large, and it does not have quite the area. However, there are two differences that I think are material. I just described this two-story cement building which was owned by the Twin Oaks Company, and the Long-Bell company does not have such a building as that; and I also described the Twin Oaks Company as having a store and office room, on this 85 foot frontage on Main Street, and on High Street. The Long-Bell Company has a frontage for their office of 34 feet. In my judgment, the store facilities of the Twin Oaks Company are superior to the store facilities of the Long-Bell Company. I considered the rentals paid by the Long-Bell Company of \$300 per month. Mr. Sweet their lease

(Testimony of Clarence F. Hyde.)

was \$300 per month, and he didn't know whether *that* 1943 or 1942, but as of January 1, 1943, and being adjusted to January 1, 1941, on the basis of construction costs, it would be 90 per cent of that amount, or a monthly rent of \$270, or an annual rental \$3240.

Q. Are you familiar with the so-called Orem properties that are now owned by the Twin Oaks property?

A. I am familiar with it by observation, from outside [220] appearance.

Q. That is what I mean. I hand you Respondent's C, and ask you if that relates to the Orem properties, as being a deed of conveyance, or a certified copy?

A. That is a certified copy of the deed of conveyance.

Q. I hand you Respondent's I for identification. Does that have any relationship to the Orem property?

A. Yes, that is the building on the Orem property.

Q. Is that a residence?

A. That is a residence.

Q. This is the building that is on the land covered by Exhibit C for identification?

A. That is right.

Q. Now, both of those Exhibits, C and I for identification—speak what you know, if anything, about the relationship of those properties to the highway that is now going to be put through the City of Eu-

(Testimony of Clarence F. Hyde.)

gene here or adjacent to the properties of the Twin Oaks Company.

A. Well, this is the building (indicating); this is the property. As stated this morning, this is the property which was being condemned or had been purchased by the State Highway Department for the new highway.

Q. You are referring to Mr. Martin's testimony?

A. Yes.

Q. Is that the property which he mentioned as having [221] been acquired by the State Highway Commission?

A. Yes.

Q. From the Twin Oaks Company.

A. That is right.

Q. Then, what is the fact, Mr. Hyde, as to whether the highway that is to be built and re-routed in Eugene, as it is now known and contracted for as to whether it affects or touches or will improve the actual business property of the Twin Oaks Company?

A. Well, it does not touch the business property, but by agreement with the State Highway Department and the City of Eugene, the railroad spur which serves the Twin Oaks Company is to be disposed of. The Twin Oaks Company will lose the use of that railroad spur.

Q. If and when the new highway is put through?

A. That is right.

Q. Did you take that circumstance into account in arriving at the fair rental value to which you have testified?

(Testimony of Clarence F. Hyde.)

A. I considered the fair rental value of the properties on the basis of comparable rentals, and so far as the railroad spur is concerned, I considered just the depreciated value of the spur itself, that is, the cost of construction less depreciation.

I don't know whether you care for this additional information but, in my opinion, the main building of the [222] company, as of January 1, 1941, that is the main operation property on High Street, in Block 18—I estimated the depreciated value of the improvement as of January 1, 1941, at \$30,100; the value of the land at \$12,000; and the total rental of that particular parcel of property as \$4850.

Q. So far as your description of the property is concerned, as you have related that, particularly the improvements, are you speaking as of January 1, 1941, or as of some other date, or substantially that date?

A. January 1, 1941. I adjusted everything to that date.

Mr. Pigg: You may cross-examine.

Cross-Examination

Q. (By Mr. Davidson): What was the relative rate of rental increases from the beginning of 1941 to the beginning of 1942, in your opinion? The business rentals?

A. The Business rental increases were very slight during that time; possibly around 5 per cent.

Q. How much would you say from the beginning of 1942 to the beginning of 1943?

(Testimony of Clarence F. Hyde.)

A. It would be about 10 per cent; the same advance, or about a 5 per cent advance.

Q. How much would you say from the first of 1943 to the first of 1944? [223]

A. About a 10 per cent advance.

Q. And from the first of 1944 to the first of 1945—in Eugene, I mean?

A. Well, it made quite a good deal of difference in the types of rental property. Along in that period of time, as a result of scarcity, some leases ran out and there was bidding for leases; therefore there were some very material increases in that period of time. I don't think there was any stable price on any regular basis.

Q. Well, in your opinion, was this property being occupied at its highest and best use?

A. Yes, I think it was.

Q. Let us go the Cottage Grove property. Mr. Rogers gave you a statement of the rentals there?

A. Yes.

Q. And the rentals for 1937 were what?

A. Zero.

Q. 1938 they were zero too?

A. As I understand it.

Q. 1939 were zero?

A. So I understand.

Q. And the rentals for 1940 were \$516, and then we come up to 1940, and you say, based on your experience, that the rental should be \$950 a year?

A. That's right. [224]

(Testimony of Clarence F. Hyde.)

Q. Notwithstanding the fact that for three years they had nothing, and one year they had been able to rent for \$516?

A. Yes, because 1941 came along and conditions were on the upgrade.

Q. In the following year it was \$783 for the year, 1941? A. Yes.

Q. In other words, that is different in practice than in theory?

A. When I said 5 per cent, I was talking about properties that are rented as entire entities, as going concerns are rented on the basis, or their fair rental value is based on the highest and best use. This property was just starting to be used for a warehouse and, according to the information I got from the Pontiac agency, there was no person in charge of the property, and the rentals that they got—compared with that use—would depend upon the number of cars that they would put in there; and they were also paying some rent for the use of the car lot.

Q. I am asking you now if the estimate of \$950 is or is not based on the rental experience at Cottage Grove as of January 1941?

A. Adjusting that back over this period of time, the storage rents have increased. It is reasonable to expect that the rental for that period of time should be that much money.

Q. In other words, you think it is reasonable to expect [225] that as of January 1, 1941, a building from which they had received nothing for three

(Testimony of Clarence F. Hyde.)

years, and \$516 in one year, that they should receive for it during that year \$950?

A. Yes, because of the increased development and the increase in the lumber business in Cottage Grove, and I think it was reasonable to believe there would be additional use for storage purposes; and that is the thing that actually happened.

Q. Isn't that rather hindsight at this time?

A. I don't think so.

Q. You think that a person who had not gotten that much, including the following year, nevertheless, as an estimate, you figure that he should have gotten that much?

A. With the increased business conditions in Cottage Grove.

Q. We are talking about January 1, 1941?

A. That is right.

Q. Are you familiar with the conditions of the Junction City property as they were on January 1, 1941?

A. I have traveled past that property; I was not inside of that continually, but I had a familiarity to this extent; I did discuss the property with Senator Gibson, who is in the automobile business across the street, and has been for many years, and he informed me he was paying \$100 a month for his rental, and Mrs. Williams, who owned the [226] building, confirmed that; and Mr. Hanson, who was the manager of the Twin Oaks Company, told me that the

(Testimony of Clarence F. Hyde.)

property there was the same as it had been since he went there 12 years ago.

Q. But do you know that the main building is not owned by the Twin Oaks Company?

A. Yes, I know that.

Q. Do you know what rent they were paying in 1941?

A. Mr. Hanson—not Mr. Hanson but Mr. Gibson, and a man who rents a part of the building said that they were paying \$50 a month.

Q. Is that what you used as your basis?

A. I considered that; I considered the other rentals across the street from that which Mr. Gibson is paying \$100 for, and a 25 foot store building across the street which paid \$25 in 1941, and another 25 foot store in the same building which was rented for \$25.

Q. If you were trying to rent to strangers for the highest and best use, you would try to rent the property to some other material industry, building material industry?

A. That is the highest and best use, yes.

Q. You think that we would get a willing tenant who would be willing to pay, and a willing landlord who would be willing to rent, at that rate?

A. Yes.

Q. You think it could be rented for that? [227]

A. Yes.

Q. Considering the earning that the corporation

(Testimony of Clarence F. Hyde.)

has made, did you consider that as an indication of the rental possibilities?

A. Where comparable properties are being rented, and from what other people are paying, and the values of such properties, we would determine more the fair rental values than the earnings of the company. That is the reason I did not use the basis of business income or earnings.

Q. If you were renting a corner store down on the corner of High Street, wouldn't you base the rental value of that store on the basis of the earnings of the person occupying it for the highest and best use?

A. On the basis of what other comparable properties would rent for.

Q. That is, other comparable companies in the same business, what they were earning?

A. What they were paying for rent.

Q. Isn't it true that they are compelled, under economic circumstances, to pay on the basis of what they earn?

A. Not always.

Q. Let us put it this way: can they afford to take a definite loss where the rent is more than the net income to pay the rent?

A. Any person cannot pay more rent than he takes in, [228] because eventually he will go out of business; and when he goes out of business, someone else who is more competent in operating the business steps in and is able to pay the rent.

(Testimony of Clarence F. Hyde.)

Q. Do you consider Mr. Scharpf and Mr. Rogers competent?

A. I haven't seen any information on their financial statements, but it would be my judgment that they are very competent men. From the statement of the earnings of the company during the past few years, I think it verifies that.

Q. Let us put it this way; suppose the company owned the property and paid no rental, and had no earnings in 1934; \$627 in 1935; \$2344 in 1936; \$2173 in 1937; a loss of \$511.65 in 1938; a gain of \$2315.38 in 1939; a gain of \$6036.35 the next year; do you think that company could afford to pay \$6700 rent for that property?

A. There are lots of times when people own property that *there* business is up and down, and the owners of the property are not always, or, rather, do not always run their rents up and down according to the earnings of the individuals that are in there.

Q. Let us take it another way. Let us assume the business had earned but a \$1100 a year average for the past 20 years. Could they afford to pay \$6700 a year rent?

A. They had a capital investment in there as long as they owned the property; their investment in the property was [229] the equivalent of paying rent.

Q. Do you know what the capital investment in the property was?

A. I don't know what the capital investment in the property was, but I do know that values have in-

(Testimony of Clarence F. Hyde.)

creased, and as values have increased, properties have become worth more.

Q. If we use capital on the investment in the property, we would get a lower net result than we have now. So that doesn't do any good. Mr. Hyde, you stated that the Twin Oaks property was more valuable than the Long-Bell property, because of the fact that it possibly had a greater frontage on High Street. Just what total frontage on High Street does the Long-Bell company have?

A. The Long-Bell company extends from—they have a total frontage of 324 feet, but there is a part of that frontage which extends up next to the railroad track where there is a railroad crossing, which has no value so far as frontage is concerned; and the frontage of the store is only 34 feet.

Q. That is the office part?

A. That is right.

Q. But they have a complete building frontage that is greater than the Twin Oaks, or was in 1941?

A. Yes, they have, put the part that is enclosed does not add any more to its value. But they do have, according to Mr. Martin, who testified this afternoon, a smaller area and [230] I judge that to be true according to the curves that come into Fifth Street.

Q. Did you take into consideration the fact that they did not own the McCormack tract in 1941?

A. Yes.

Q. And that fact cuts down their frontage on High Street?

(Testimony of Clarence F. Hyde.)

A. Yes, the additional land that I placed the additional value of \$20 a month on, was the land not covered by improvements; it was approximately the same area as the McCormack land. The McCormack land amounted to 8940 square feet, if I remember correctly, and the other land was a little over 8700 square feet.

Q. Are you familiar with the Kreml Bakery property? A. Yes.

Q. Will you describe that?

A. That is a frame building, with 75 feet frontage, and extends east and west a distance of 145 feet. It is a very lightly constructed frame building. The exterior is wood lath, and it has stucco on it, and, as a result of weather, rain, getting wet and drying out, that stucco is breaking and cracking and becoming pretty badly broken.

Q. How will the land area in that building compare with the main Eugene property of Twin Oaks?

A. The area of that property is 75x145, and the area [231] of the Twin Oaks—of their store building and the shed and the storage space and the buildings back—is 85x145, and, in addition to that, they have a concrete or cement building 34x50, two full stories and a basement, and a building which was destroyed by fire, with approximately 40x95 dimensions. I have not figured it on a percentage basis, but the area which is covered by the Twin Oaks Company buildings is very much in excess of that.

Q. It sounds like it is about twice as much?

(Testimony of Clarence F. Hyde.)

A. Yes, twice as much and superior construction. The Kreml Bakery, that is a two-story building. I have not been on the inside of that building, except on the first floor; I don't know whether there is anything upstairs or not. At the present time a part of that building is being rented by the Twin Oaks Company, and a part of it is being rented by a produce company which has some refrigeration in it.

Q. Do you know that that building was being actively offered for sale in 1939 and 1940?

A. I was told by Mr. Rogers that the building had been offered for sale at one time for \$6000, and I also learned it sold at a later date at a much higher figure.

Q. As I understand you, in considering the rental values of Eugene property, you gave no effect to any assumed or supposed imminence of highway construction through the property? [232]

A. No, I did not consider that as a hazard to the property, because I made an investigation on that, and as a result of my investigation, I found that in November 1946 the City of Eugene and Lane County and the state had entered into an agreement that the spur was to be done away with, and that the highway was not to touch the Twin Oaks property.

Q. Now, Mr. Hyde, this agreement of November 1946 would not have much effect on the highway imminence January 1, 1941, would it?

A. No; but at that time, so far as highway construction was concerned, the Oregon State Highway Engineers were surveying in several areas. They

(Testimony of Clarence F. Hyde.)

were surveying through this subject property; they were also making surveys to eliminate Eugene and by-pass the city entirely; there was no certainty that a highway would be put through there.

Q. You heard Mr. Martin testify this morning that he was the locating engineer of that route, and that he had recommended that route to the Oregon Highway Commission, and that that was the status upon January 1, 1941; didn't you?

A. I heard him say that he made the survey and submitted it to the highway department. I didn't hear him state what his recommendations were. I do know this, that Mr. J. M. Devers told me that prior to 1946 everything was just a matter of surveys and talk.

Q. Were you living in Eugene at the time? [233]

A. Yes.

Q. Do you know whether there were any meetings or remonstrances against the proposed locations?

A. I know that some of the business men who would be affected by the highway, by any change in the highway going through their property, or in front of their property, did make a remonstrance.

Q. In other words, they were concerned about it?

A. Yes; they didn't want the highway to go through their property.

Q. Going back to Junction City, do you know that the hollow tile building was built after January 1, 1941?

A. No, I don't.

(Testimony of Clarence F. Hyde.)

Q. Did anybody tell you about that?

A. No. Mr. Hanson, the manager said it was built prior to 1941. He said the hollow tile building was constructed on land that the company did not own, but he said that there had been no change in that since he had been there.

Mr. Davidson: We will have to clear that up with another witness.

The Witness: There is chance for an error.

Mr. Davidson: That is all.

Redirect Examination .

By Mr. Pigg:

(The document referred to was marked as Respondent's Exhibit J for identification.)

Q. I hand you Respondent's J for identification. You were asked by Mr. Davidson, Mr. Hyde, concerning the possibility of that property being offered, or the fact that that piece of property was being actively offered in 1939 or 1940. Does that refer to the property that Mr. Davidson spoke of (indicating document)? A. Yes, it does.

Q. Does it also refer to the same property that Mr. Rogers spoke to you of? A. It does.

Q. Is that also the property, which, I believe you said, Mr. Rogers had been offered—just what did he say with respect to that?

The Court: That is going over the same thing again. What materiality does it have?

Mr. Pigg: It has this materiality; it shows that

(Testimony of Clarence F. Hyde.)

this was a piece of property on which they rely as comparable property, as——

The Court: I don't think we want to go into the details of what that property is. I think we have gone pretty far afield already.

Mr. Pigg: That's all.

The Court: You may stand aside.

(Witness excused.)

The Court: We will take a five minute recess.

(Whereupon a five minute recess was taken.)

Mr. Pigg: I would like to recall Mr. Hyde to the stand.

Whereupon,

CLARENCE F. HYDE

recalled as a witness for and on behalf of the Respondent, having been previously sworn, was further examined and testified as follows:

Further Redirect Examination

By Mr. Pigg:

Q. Mr. Hyde, will you remove from Respondent's D the pages which you identified, the plats that you had drawn and the pictures that you identified?
A. Yes.

Q. These pages numbered 1, 2, 5, 6, 7, 8, 9, 13, 14, 15, 16 and 17 are the same pages that you identified in your direct examination in Respondent's D?

A. That is right.

(Testimony of Clarence F. Hyde.)

Mr. Pigg: If Your Honor please, if I can offer them as a group——

The Court: Is there any objection to this evidence?

Mr. Davidson: I don't know what it is. Yes, there will be objections.

The Court: All right, make the objection, and we will determine that now. [236]

Mr. Davidson: We object to the introduction of the photographs made in 1948, which do not purport to show the condition of the occupancy of the building in January 1941, at the time he testified about: they are simply stated to be photographs to be taken in the last ten days by the witness, and therefore are irrelevant to the question involved.

Mr. Pigg: The witness stated that his testimony related to these properties as they existed in January 1941.

Mr. Davidson: We admit he testified to that, but the photographs do not so relate the testimony.

The Court: I believe I will sustain the objection. There are one or two additional buildings shown up in here, and one building was burned and so forth. I think it is just encumbering the record. You may stand aside.

(Witness excused.)

Mr. Pigg: Your Honor, let the record show that the only document that Mr. Hyde is taking with him is Respondent's D for identification, which I will not offer in evidence.

The Court: All right. Call your next witness.

Mr. Pigg: Mr. Rugh.

Whereupon,

LOYALL R. RUGH

called as a witness for and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows: [237]

Direct Examination

By Mr. Pigg:

Q. Will you state your name?

A. Loyall R. Rugh.

Q. Mr. Rugh, I want to hurry through this as fast as possible. What is your business or occupation?

A. Real estate.

Q. Real estate brokerage or what?

A. Real estate broker, and handling all types of city and country property. appraising and making loans, and so forth.

Q. You mean business properties, commercial properties, and so on?

A. Yes.

Q. Where are you engaged in that business, Mr. Rugh?

A. Eugene, Oregon.

Q. For how long have you been engaged in business there?

A. 38 years.

Q. In the course of the conduct of your business, as you have described it, is it necessary, or do you have occasion to place a value or determine the fair market value of properties for the purpose of sale or income?

A. Yes.

Q. And for the purpose of determining the fair

(Testimony of Loyall R. Rugh.)

rental value of the properties? A. Yes. [238]

Q. And have you made such appraisals for any government or state agency? A. Yes.

Q. Will you just state briefly what those appraisals have covered?

A. Well, I have been called in three different times in the last year and a half—in the last less than a year—to make appraisals for the State Highway Commission on properties along the highway through Eugene. There have been about eight or nine properties that I have appraised, and I have appraised two properties for private individuals; one was appraised for the owner and so to the Highway Commission, and another one that I appraised for a private company, which they sold to the Highway Commission. In other words, I sold one and they sold one.

Q. Are you familiar with the real properties that were owned by the Twin Oaks Company, or the Twin Oaks Builders Supply Company as of January 1, 1941? A. Yes.

Q. Have you made an independent examination and search of the public or other recognized concerns for title for real properties? A. Yes.

Q. For that purpose? A. Yes. [239]

Q. And do you have a general familiarity with the class and character of the fixtures and office furniture of the Twin Oaks Company as of that time?

A. Yes, I have.

(Testimony of Loyall R. Rugh.)

Q. Were you present during the period that Mr. Hyde just gave his testimony? A. Yes.

Q. You heard his description of the properties of the Twin Oaks Company? A. Yes.

Q. Are they the same properties that you found to be owned by the company at this time?

A. They are in all particulars, except the High Street property; that was listed as personal property, and I did not find that, and therefore it is not in my testimony; but nevertheless I would testify as to the other property the same as he did.

Q. In other words, your testimony would not cover the High Street property?

A. Not the High Street, on leased land.

Q. Just what did that involve?

A. That involved \$300 a year rental, I think he testified; but I do not have that.

Q. Now, have you made a study and examination of the pertinent facts in this case for the purpose of arriving at [240] the fair rental value of the properties in question, that is, only the rental value of them as of January 1, 1941? A. Yes.

Q. Have you arrived at any such a conclusion?

A. Yes, I have.

Q. Will you state the amount of the rental value?

A. You do want the total amounts?

Q. Yes.

A. The total amount of the rental value as I figured it, and that includes the furniture and fixtures in the two different stores and offices.

(Testimony of Loyall R. Rugh.)

The Court: It does or does not include?

The Witness: It does include; and the total rental that I have is \$7260 a year.

Q. (By Mr. Pigg): How much of this total amount do you finally attribute to the fixtures and to the furniture and fixtures?

A. \$25 in the large store in Eugene, and \$15 in Junction City.

Q. You mean \$25 a month? A. Yes.

Q. Just state as briefly as you can, in your own way, Mr. Rugh, as to how you arrived at that value.

A. Well, I approached this problem in three different ways. First and mainly I approached it from the standpoint [241] of other property that I compared them to, and several properties that I was conversant with, and I compared notes and compared one with the other, and in that way I felt it was quite a good way to establish a fair rental, and kept on the conservative side for these purposes. For instance, I took a piece of property rented by the Consolidated Freight Company, 265 West Eighth Street, and that property in 1941 was rented for \$175 a month; that building was 66 x 166, and the property was and is now in a very poor repair. In fact, I had a contractor one of the leading contractors in Eugene, look at it to give me an estimate of what it would cost to put it in repair, and he said that he—I got that for the owner and wrote to him about it—and he said that it would take from eight to ten thousand dollars to put the

(Testimony of Loyall R. Rugh.)

building in repair. It is a one-story building, with 66 feet in front.

The Court: I believe the court is not interested in the details about other property. We want to talk about this property.

The Witness: As a comparison, the rental on the main building on 669 High, that is 89 x 145. That building would be worth \$350 a month. I cut it down conservatively, and I rated it as \$225 a month. There is another piece of property that is occupied by a dealer in building materials, and has been for many years, the Scobert business, on West Seventh Street. [242]

The Court: Is that property that belongs to the Twin Oaks?

The Witness: No.

The Court: Then don't talk to us about it.

The Witness: Well, I used that as a comparison.

The Court: Give us the values that you placed on the rentals of the Twin Oaks property.

The Witness: To make a long story short. I gave the cement building which is 34 x 48, and the shed back of it, 40 x 97 feet, plus the land on which it stands, and the rest of that lot—and a part of lot 3 in the back, less the railroad trackage, which I segregated or appraised separately—I placed the rental of that at \$125 a month.

And the Junction City property I placed a rental on that of \$50 a month plus \$15 a month for the furniture. On the Cottage Grove property, I placed

(Testimony of Loyall R. Rugh.)

a rental of \$50 a month—well, \$65 a month including the lot facing on the highway which was a good parking lot adjoining the Pontiac corner—adjoining the Pontiac agency, that is used for parking.

And then I took another method. I appraised the value of the property so as to take another way of figuring the rental value, and the main building on High Street, 669 High, which I learned would have cost in 1941 approximately \$38,000 to build, and I also learned it was remodeled in 1940, so that it was put in good shape; so I appraised that building at \$25,000, and the cement building, 34 x 48, which, by the way, has a laminated floor and hydraulic elevator—a very good solid building—I appraised that as \$10,000. The shed that was burned down, I appraised that with what the insurance brought, \$7400. And the Junction City building, I took the tile building because we were told by the man up there, Mr. Hanson——

Mr. Pigg: Who is Mr. Hanson?

The Witness: He is the manager of the company up there. I was told that that had been there for ten or twelve years. The buildings I appraised at \$5400. And the Cottage Grove building, which I learned would have cost about \$22,000 in 1941, I appraised at \$8000. That made \$55,800. And the lot, 85 x 145 on which the main building stands on High Street, I appraised that at \$10,580 in 1941; and the lot, 80 x 145 on which the cement building stands, with

(Testimony of Loyall R. Rugh.)

the shed in the back, I appraised at \$10,000. My reason was because it was a corner.

I segregated the trackage. The track stands on a piece of ground 15 x 240 feet, and it is paved, and it adjoins the paved alley. I learned from competent people that the trackage is worth \$5 a running foot; and the ground I appraised at \$3500. That makes \$15,500.2 And I cut that down to \$10,000, although the track is in good shape—that is, the land value. And the buildings—that ran it to \$91,309. And then the land value and all runs it up to \$95,339.

Another way. I figured the value of the buildings, and then I figured depreciation on the frame buildings at 3 per cent a year, which amounted to \$1374, and the depreciation to the cement building at 2 per cent, \$200, making \$1574. The taxes were \$413 and then I took the insurance and established a fair amount of insurance carriage. On buildings and furniture, the rate would be 90 per cent coverage, 14.14 a thousand, and that figures \$888.59. The total expense then charged against that property for those items would be \$3396.57. In that should be included upkeep which I put at a low figure, \$500.

Then I figure 5 per cent on the investment that an owner should have, which amounted to \$144,566.95, and that brought a total of \$7963.54. That is one way of arriving at the base rental, although that is higher than I figured it.

The Court: On what basis did you figure the \$7900?

(Testimony of Loyall R. Rugh.)

The Witness: I figures 5 per cent. And then I approached it from another angle. I learned through what was stated—I learned that the gross income for 1941 was \$375,000.

The Court: Gross income of what?

The Witness: On this business.

The Court: On what?

The Witness: On the business. [245]

The Court: On the Twin Oaks Company?

The Witness: Twin Oaks. I think it was \$375,000, which I learned from people who are acquainted with it, and from testimony. Now, from people who are engaged in this business of leasing property on a percentage basis, they rent all the way from 5 to 7 or 8 or ten or 12 per cent. I learned that from competent people. But, in this kind of a business, 2½ per cent would be a very fair estimate of a business of this kind, the retail builders supply business, so I took 2½ per cent, which amounts to \$9375. So that I figured my statement on the original estimate, as to basing it on comparative rentals, in which I was conservative, was a fair estimate. That would give it less value than these other properties that I compared it with, and in that way I figured that the figure of \$7260 a year would be very conservative and very fair; and that did not include the \$300, I believe, on the High Street property, which I didn't know about.

Q. (By Mr. Pigg): When you say 5 per cent

(Testimony of Loyall R. Rugh.)

net return, do you mean before or after taxes and depreciation?

A. That is after taxes and depreciation and insurance and upkeep.

Mr. Pigg: You may cross-examine.

Cross-Examination

By Mr. Davidson: [246]

Q. Mr. Rugh, do you know of any instance in which a building material yard has been leased of $2\frac{1}{2}$ per cent of their gross sales?

A. No, I do not.

Q. In other words, have you any foundation for your statement that that is at all customary in the building material business?

A. Just one way of checking it; it is customary to rent on that basis, and it is becoming more and more customary.

Q. Do you know of any instances outside of the clothing business, shoe business, and general merchandising business, and dry goods, where the leases have been on that basis?

A. I do not see why they should not be.

Q. Answer the question? A. No.

Q. You don't know of any?

A. That's right.

Q. So far as you know, that is not any basis for figuring the fair rental value?

A. I think that is one basis.

Q. But you don't know of any business that is

(Testimony of Loyall R. Rugh.)

rented on that basis, I mean, a building material supply business? A. No.

Q. The basis on which you figured, were those 1941 values? A. Yes. [247]

Q. How did you arrive at the 1941 values?

A. I arrived at them through handling properties, and just general experience and common sense and judgment.

Q. You based it on your own experience as to sales of property that were made in 1941, and did not relate it to the present day values; you just took them for what you knew in 1941?

A. I know of property that sold recently that would be three times as high as any property values at that time; and I took that into consideration, and based that on what it would be comparatively in 1941.

Q. How did you do that? Did you take it at one third of what they are selling today, or didn't you?

A. In some cases it would be one third; in some cases there would not be nearly that much variation. It is based on the knowledge of the sale of several properties here in the last few years.

Q. Did you find what furniture and fixtures they had in 1941, in January 1941, or did you take the present furniture and fixtures?

A. I took about half of the present fixtures, and I found out afterwards what the fixtures were valued at, and I found that my first figure was quite

(Testimony of Loyall R. Rugh.)

a bit lower. I based my idea on what the rental value would be in 1941 on the fixtures. [248]

Q. Your appraisals that you have made for the State Highway Commission, have they been of the rental value? A. No; the land value.

Q. And those that you have made have not been in any event of rental value?

A. Only property that I appraised was for a rental value.

Q. And the appraisals for the State Highway Commission were appraisals for sale?

A. Yes.

Q. You did not appraise the rental values?

A. I appraised the sale value, and I appraised somewhat on the same basis for the rental value too.

Q. Mr. Rugh, so far as the Cottage Grove property is concerned, wouldn't you think that a fair indication of what the rental value was would be what they had been able to get?

A. No; I have known of cases where things have changed very materially. They started to pick up in 1941, and because a man does not rent a piece of property in one period of time, that is no reason why it doesn't have rental value at that time or at another. Just because the property could not be rented at that time doesn't mean that they couldn't make it up at a later time. I know of people in Eugene who are making up for lost time for rentals. They took a beating then, and they are now reaping a harvest. [249]

(Testimony of Loyall R. Rugh.)

Q. This is 1948?

A. Well, the same thing applies.

Q. In other words, you think that at the beginning of 1941 any assessment of fair rental value should have anticipated that there would be an increase in demand for the rental of such properties?

A. The demand was broadening; there was a demand.

Q. It looked that way in 1929.

A. I am not thinking about 1929; I am thinking about 1941.

Q. Your theory is that in January 1941, we should have anticipated that things were going to go up, and we should have based the rentals on that?

A. The indication was that things were coming up.

Q. Would you say that if you were occupying a building, and thereafter you wanted to renew the lease, that the profit that you had made out of that business would not be some indication of what the occupancy value of the property would be to you.

A. That would be one factor. There are other factors that enter into it.

Q. Yes, but would you say, if you were operating a business here, making an average of \$2000 a year for 5 years before the payment of rent, that you could afford to enter into lease for \$7500 a year? Would you or would you not want [250] to enter into such a lease?

(Testimony of Loyall R. Rugh.)

A. Well, I'm not going back into that; I don't know.

Q. You don't know, but you think you might?

A. It would depend on how it looked when I went into the lease. I have leased property here, and people have made money at what I considered a fair rental value.

Q. It was fair if you made money, but if you didn't make money, it would not be fair?

A. That did not enter into it; one business may be successful while another is not, at the same place.

Mr. Davidson: That is all.

Redirect Examination

By Mr. Pigg:

Q. As to what constitutes a fair rental value of a property, did your opinion depend in any wise on any one particular person to pay that price?

A. Not necessarily. For instance, that property on High Street is *very located*, if I may say, and it is 5½ blocks from the First National Bank, close in, well located, and other people—there have been many people looking for places to rent, and we have always had a shortage in Eugene for business rentals.

Q. What is your understanding of the term "fair market value" at this time, and in connection with your studying this case for the purpose for which you made your study? [251]

A. That would relate to where you had a man

(Testimony of Loyall R. Rugh.)

that wanted to sell, and a willing buyer, not under compulsion, that is, with a buyer who wanted to buy but was not compelled to buy, and a seller who wanted to sell but who was not compelled to sell, and where each of the parties, the seller and the buyer would be conversant with the facts concerning the property. And, of course, there are a lot of ways of describing it, but that is one of the main factors.

Q. Under those circumstances, would you assume the purchaser or the lessee would be the person with the ability to pay a fair rental?

A. Yes, I would think the piece of property that was especially adapted for the use that he wanted it, could be leased to him at that figure.

Q. And that is the assumption you made or took at the time you made the appraisal?

A. Yes. I figure there's a reasonable amount you can ask for the rental of a property, and if someone is making use of it, there is a reasonable way of arriving at the fair rental value. And that is the way I have figured. I have tried to be realistic on it.

Mr. Pigg: That's all.

Mr. Davidson: That's all.

The Court: You may stand aside.

(Witness excused.) [252]

The Court: Call the next witness.

Mr. Pigg: The Respondent rests.

Mr. Davidson: We should like to call Mr. Rogers back for about five minutes to clear up some things.

Whereupon,

JOHN J. ROGERS

recalled as a witness by and on behalf of the Petitioner, having been previously sworn, was further examined and testified as follows:

Further Direct Examination

By Mr. Davidson:

Q. You have already been sworn?

A. Yes.

Q. Will you state to what extent the buildings constituting the Junction City plant were added to after January 1, 1941?

A. The hollow tile building that was mentioned was repaired. It was a repair job. There was an old frame building there, an old lean-to, and it was not constructed and used as now. It was put to about the same use; but it was not constructed the same way; in the process of the later years, about 1944 or 1945, we made the building as it is now; that is, we remodeled the building.

Q. The remodeling was after 1941?

A. Way after that. [253]

Q. Was that the only change in the Junction City property? A. I know of nothing else.

Q. To what extent was the Eugene building enlarged or changed after January 1, 1941?

A. About 4 years ago we had a very crude store; we had a partition, and then another partition, and then we had a toilet between them; and about 4 years ago we tore out and remodeled the inside; we

(Testimony of John J. Rogers.)

remodeled and tore out the partition, and a lot of painting and closed the driveways and put in some shelves, and put in a few signs, display tables, and so on, and called it a store. That is what we have at the present time.

Q. That is the store on High Street to which Mr. Hyde referred? A. Yes.

Q. What other changes were made in the Eugene property?

The Court: That change was made about 4 years ago; you mean about 1944?

The Witness: I would say 1945, Judge. About 3 years ago an old wreck of a building immediately to the rear of the old concrete building—by the way, that concrete building must be—I wouldn't want to guess how old it is—we have maintained it well—I would say honestly that it is 30 years old. It is charged off, and right in the rear of that [254] was a shed that we had to use because we had lumber to store there every once in a while; and we braced up the sides there and patched up the floor here and there and then the roof. And then that building burned about 4 years ago, and the figure I gave to Mr. Hyde was replacement figure. It was not the value of the building.

Q. (By Mr. Davidson): Was that building replaced with a shed?

A. It was. But the insurance company inspected it, and to us it had a value, but to anybody else it wasn't worth a nickel. Also, in the last three or

(Testimony of John J. Rogers.)

four years, we have surrounded our entire yard with a cyclone fence.

Q. Do you think that is about all?

A. The property on Charleston Street, where we had our coal bunkers, we were very happy to dispose of as of the first of January of this year. The property that we just sold consisted of a lease from the Oregon Electric, a little office, probably 10 x 12, and some concrete bunkers; and a wooden frame building also, and two Ford trucks, furniture and equipment, unloading equipment—the whole thing we sold for \$5000, and we felt happy to get it.

The Court: When did you make that sale?

The Witness: The first of January of this year.

Mr. Davidson: That is all.

The Witness: May I make a comment about Cottage [255] Grove?

Q. (By Mr. Davidson): Yes, tell us about the Cottage Grove property. Did you make any changes there since 1941?

A. We have maintained that property. The building was a wreck, and more recently we painted it and overhauled it and made it so that it is now producing some income.

Mr. Davidson: That is all.

The Court: I would like to ask one question. This property which your corporation rented to the partnership on January 1, 1941, what do you regard the value of that to be?

The Witness: Judge, the depreciated real estate,

(Testimony of John J. Rogers.)

furniture and fixtures, buildings, and everything that we transferred, we estimated, I think, \$35,000. As I said to you this morning, we didn't know whether it was worth \$35,000 or not.

The Court: Why?

The Witness: Because the value of the property depended upon its proximity or to the proximity of a spur track that went through the back of it. We have now lost the spur track, and have been compelled to acquire 4 acres of land elsewhere and put in a spur track of about 400 feet, and to add tracks so that we can enlarge our merchandise storage two and one half miles away, where we can unload our merchandise. That is a substitute for the spur track that has been there [256] and was there when we bought the property. That property, as a lumber yard, isn't worth more than fifty cents on the dollar in the terms of what a yard would be worth to a lumberman when the spur track was a permanent thing.

The Court: Are there any further questions of the witness?

Mr. Pigg: No cross-examination.

Mr. Davidson: Nothing further.

The Court: You may stand aside.

(Witness excused.)

Mr. Davidson: That is all for the Petitioner.

Mr. Pigg: No further testimony for the Respondent.

The Court: Does that close the testimony?

Mr. Davidson: That closes the oral testimony.

The Court: Are there any documents to be introduced?

Mr. Pigg: There are some additional documents, Your Honor, many of which have been identified, and which I offer, without objection by Petitioner. The first one is Respondent's A for identification.

The Court: What is that?

Mr. Pigg: That is the income tax return of the Twin Oaks Builders Supply Company, and it also includes the corporation's excess profits tax return for the same year.

The Court: It may be admitted as Respondent's A. [257]

(The document referred to, heretofore marked as Respondent's Exhibit A for identification, was received in evidence as Respondent's Exhibit A.)

Mr. Pigg: As Respondent's B for identification, which is a certified copy of a warranty deed dated in July of 1941.

The Court: From whom and to whom?

Mr. Pigg: From Martha E. McCormack to the Twin Oaks Company.

The Court: Was that what was referred to as the McCormack property?

Mr. Pigg: That's right.

The Court: That is Respondent's B?

Mr. Pigg: Yes.

The Court: That will be received and marked as Respondent's B.

(The document referred to, heretofore marked as Respondent's Exhibit B for identification, was received in evidence as Respondent's Exhibit B.)

Mr. Pigg: And as Respondent's C, a document which has already been identified, which is a certified copy of a deed, December 1, 1943, from Richard Orem to Twin Oaks.

The Court: It will be received and marked as Respondent's C. [258]

(The document referred to, heretofore marked as Respondent's Exhibit C for identification, was received in evidence as Respondent's Exhibit C.)

Mr. Pigg: As Respondent's E,—

The Court: What became of Respondent's D?

Mr. Pigg: Respondent's D is the document which I stated a while ago would not be offered in evidence.

The Court: All right.

Mr. Pigg: As Respondent's E, a document heretofore identified, which is a certified copy of a warranty deed from Sherman L. Godard to Twin Oaks Lumber Company, which was filed for record on July 23, 1929.

The Court: It will be received and marked as Respondent's E. Let the record show there is no Respondent's Exhibit D.

(The document referred to, heretofore marked as Respondent's Exhibit E for identification, was received in evidence as Respondent's Exhibit E.)

Mr. Pigg: As Respondent's F, a document heretofore identified as such, being a photostatic copy of a deed from C. O. Peterson et ux to Twin Oaks Lumber Company, filed for record on January 26, 1929.

The Court: That will be received and admitted as Respondent's F. [259]

(The document referred to, heretofore marked as Respondent's Exhibit F for identification, was received in evidence as Respondent's Exhibit F.)

Mr. Pigg: As Respondent's G, a document heretofore identified as such, being a certified photostatic copy of a warranty deed from F. L. Charmers et ux to Twin Oaks Lumber Company, filed for record June 8, 1925.

The Court: It will be admitted as Respondent's G.

(The document referred to, heretofore marked as Respondent's Exhibit G for identification, was received in evidence as Respondent's Exhibit G.)

Mr. Pigg: As Respondent's H, a document heretofore identified as such, which is a certified copy of a warranty deed,—may I withdraw the offer of Exhibit H, and let the record show there will be no Exhibit H.

The Court: It may be withdrawn.

Mr. Pigg: If the court please, the exhibit which I asked to withdraw, I find is the same as Exhibit B.

The Court: Exhibit H, which you decided to withdraw is the same as Exhibit B; is that it?

Mr. Pigg: That is right.

The Court: All right.

Mr. Pigg: I offer at this time Respondent's I, the photographs which Witness Hyde identified with respect to Exhibit H for identification, and the only purpose of the offer, [260] is to show a piece of property that is not in use in the business of the Petitioner, which is affected by the new highway.

Mr. Davidson: We object to it on the same ground as the other photographs; they speak for themselves, of course, but they are taken seven and one half years late.

The Court: Is this one of the late photographs?

Mr. Davidson: Yes.

The Court: The objection is sustained.

Mr. Pigg: Exhibit J, a document heretofore identified as such,—and may I also withdraw Exhibit J?

The Court: It may be withdrawn. Respondent's J is withdrawn.

Mr. Pigg: At this time, as Respondent's Exhibit K, the corporation income declared value excess profits tax return, to which is attached also the return of a personal holding company of Twin Oaks Company for the year 1944.

Mr. Davidson: No objection.

The Court: It will be admitted as Respondent's K.

(The document referred to was marked and received in evidence as Respondent's Exhibit K.)

Mr. Pigg: As Respondent's L, the corporation income and declared value excess profits tax return of the Twin Oaks Company for the year 1942, attached to which is also the original of the personal holding company return of the same [261] corporation, the same year.

The Court: It will be admitted as Respondent's L.

(The document referred to was marked and received in evidence as Respondent's Exhibit L.)

Mr. Pigg: And as Respondent's Exhibit M, the corporation income and declared value excess profits return of the Twin Oaks Company for the year 1943, to which is also attached the personal holding company return for the same corporation for the same year.

The Court: It will be admitted as Respondent's M.

(The document referred to was marked and received in evidence as Respondent's Exhibit M.)

Mr. Pigg: As Respondent's N, the income and

the declared value excess profits return of the Twin Oaks Company for the year 1944, to which is attached the personal holding company return for the same company for the same year.

The Court: It will be received as Respondent's N.

(The document referred to was marked and received in evidence as Respondent's Exhibit N.)

Mr. Pigg: As Respondent's O, the partnership return of income of the Twin Oaks Builders Supply Company of 1941.

The Court: It will be admitted as Respondent's O.

(The document referred to was marked and received in evidence as Respondent's Exhibit O.) [262]

Mr. Pigg: And as Respondent's P, the partnership return of income of the Twin Oaks Builders Supply Company for the year 1942.

The Court: It will be admitted as Respondent's P.

(The document referred to was marked and received in evidence as Respondent's Exhibit P.)

Mr. Pigg: As Respondent's Q, the partnership return of income for the Twin Oaks Builders Supply Company for the year 1943, with attached schedule.

The Court: It will be admitted as Respondent's Q.

(The document referred to was marked and received in evidence as Respondent's Exhibit Q.)

Mr. Pigg: As Respondent's Exhibit R, the partnership return of income of the Twin Oaks Builders Supply Company, with attached schedules, for the year 1944.

The Court: It will be admitted as Respondent's R.

(The document referred to was marked and received in evidence as Respondent's Exhibit R.)

Mr. Pigg: As Respondent's S, we offer the individual return of Corabelle M. Rogers for the year 1941.

The Court: It will be admitted as Respondent's S.

(The document referred to was marked and received in evidence as Respondent's Exhibit S.)

Mr. Pigg: As Respondent's Exhibit T, the return of Corabelle M. Rogers for the year 1942.

The Court: It will be admitted as Respondent's T.

(The document referred to was marked and received in evidence as Respondent's Exhibit T.)

Mr. Pigg: As Exhibit U, we offer the return of Corabelle M. Rogers for the year 1943.

The Court: It will be admitted as Respondent's U.

(The document referred to was marked and received in evidence as Respondent's Exhibit U.)

Mr. Pigg: As Respondent's V, the return of Corabelle M. Rogers for the year 1944.

The Court: It will be admitted as Respondent's Exhibit V.

(The document referred to was marked and received in evidence as Respondent's Exhibit V.)

Mr. Pigg: As Respondent's Exhibit W, the return of Louis C. Scharpf for the year 1941.

The Court: It will be admitted as Respondent's Exhibit W.

(The document referred to was marked and received in evidence as Respondent's Exhibit W.)

Mr. Pigg: And as Respondent's Exhibit X, the return of Louis C. Scharpf for the year 1942.

The Court: It will be admitted as Respondent's Exhibit X.

(The document referred to was marked and received in evidence as Respondent's Exhibit X.) [264]

Mr. Pigg: As Respondent's Exhibit Y, the return of Louis C. Scharpf for the year 1943.

The Court: It will be admitted as Respondent's Y.

(The document referred to was marked and received in evidence as Respondent's Exhibit Y.)

Mr. Pigg: Let the record show that I have just detached from the returns some papers that were not a part of the return.

The Court: From Exhibit Y?

Mr. Pigg: Yes, Your Honor.

The Court: Very well.

Mr. Pigg: I will offer the return of Louis C. Scharpf for the year 1944 as an exhibit.

The Court: That will be admitted as Respondent's Exhibit Z.

(The document referred to was marked and received in evidence as Respondent's Exhibit Z.)

Mr. Pigg: As Respondent's AA, the return of Eva M. Scharpf for the year 1941.

The Court: It will be admitted as Respondent's Exhibit AA.

(The document referred to was marked and received in evidence as Respondent's Exhibit AA.)

Mr. Pigg: As Respondent's Exhibit BB, the return of Eva M. Scharpf for the year 1942. [265]

The Court: It will be admitted and so marked.

(The document referred to was marked and received in evidence as Respondent's Exhibit BB.)

Mr. Pigg: As Respondent's CC, the return of Eva M. Scharpf for the year 1943.

The Court: That will be admitted and marked as Respondent's CC.

(The document referred to was marked and received in evidence as Respondent's Exhibit CC.)

Mr. Pigg: As Respondent's DD, the return of Eva M. Scharpf for the year 1944, and let the record show that the last page, page 4, has been torn loose from the others, and only fastened with a clip.

The Court: It will be so noted and the exhibit will be admitted as Respondent's DD.

(The document referred to was marked and received in evidence as Respondent's Exhibit DD.)

Mr. Pigg: As Respondent's Exhibit EE, the return of John J. Rogers for the year 1941.

The Court: It will be admitted and marked as Respondent's EE.

(The document referred to was marked and received in evidence as Respondent's Exhibit EE.)

Mr. Pigg: As Exhibit FF, the return of John J. Rogers for the year 1942. [266]

The Court: It will be admitted and so marked.

(The document referred to was marked and received in evidence as Respondent's Exhibit FF.)

Mr. Pigg: As Exhibit GG, the return of John J. Rogers for the year 1944.

The Court: It will be admitted and marked as Respondent's Exhibit GG.

(The document referred to was marked and received in evidence as Respondent's Exhibit GG.)

Mr. Pigg: Your Honor, let the record show that at the moment I cannot locate the 1943 return of John J. Rogers. I believe that counsel is willing to stipulate, if I can find it before the court leaves, to have it admitted as Respondent's Exhibit HH.

Mr. Davidson: No objection.

The Court: It will be received and marked as HH when received.

Mr. Pigg: As Respondent's II, which I wish to offer, I understand counsel has certain objections to, or, reservations.

The Court: What is the document? Is that the document showing a comparison of the tax liability based upon non-recognition of the partnership doing business as the Twin Oaks Builders Supply Company, and this following list of papers?

Mr. Pigg: Those figures and schedules and computations [267] have been prepared for the Re-

spondent for the purpose of showing the tax reduction, or the difference between the amount of taxes that are payable or should be paid on the basis of the partnership returns arrangement, as compared with the income if it was returned by the corporation as the Respondent contends it should be. It is the difference between the two in schedule form. I understand Mr. Davidson has some objection.

Mr. Davidson: I think that is not admissible for any purpose. In the first place, it is not based upon any facts, but merely on an assumption. It is highly prejudicial in that it attempts to show, and the only purpose of it is to show that there was less tax liability under the partnership than as the Respondent contends. Furthermore, it is based upon the assumption that it is a corporation, and then it comes under the excess profits tax, when you use the declared value of the corporation, based upon the assumption that it is a corporation. He attempts to show that the salaries would have been paid at the same rate they were in 1940; not what they were, but what the government allowed them on a settlement. It does not show that the government is now assuming for these years against these individuals, taxes that are considerable over 100 per cent of the net income. It is an assumption of facts, not in the record, and is therefore inadmissible.

The Court: I sustain the objection. It is just a matter of computation. It is was admitted, it would have to be introduced under the hypotheses

claimed, and the court can take judicial notice of the rates.

Mr. Pigg: It was only offered for the purpose of convenience, and I believe the computation is as much material as some matter that I made no objection to. It is only for the purpose of aiding the court, giving the court a concrete picture, from which it can make any deductions or adjustment or any hypothesis that it may see fit. If the court does not desire it, of course I will not press it.

The Court: I don't believe it should be received.

Mr. Pigg: It could not be offered as any evidence, of course.

The Court: It is a computation. And I think we have so many figures here now that it wouldn't help any. Does that conclude your offer?

Mr. Pigg: Yes, that completes the Respondent's case.

Mr. Davidson: I think that before we go we should check the exhibits.

The Court: The next question is the matter of briefs. Where you have a small record, I don't think there is any particular value in having briefs seriatim, but in a case where the record is quite long, my preference is for seriatim briefs. How much time does the Petitioner desire to have? [269]

Mr. Davidson: At least the 45 days.

The Court: We will make Petitioner's brief due in 45 days. What date will that be?

The Clerk: July 23.

The Court: July 23. And what time would the respondent desire in which to file a reply?

Mr. Pigg: Of course 30 days is the customary time, but as Your Honor knows, when we have a number of briefs to write in a longer case, we cannot always get them in there on the same date.

The Court: I will give until the first of September for the Respondent. What day will that be?

The Clerk: What will be Wednesday.

The Court: I will give you until September 3 for the Respondent to reply. That is, for the Respondent's brief; and then the Petitioner will have 20 days thereafter. It will be September 23.

(Whereupon at 5:45 p.m. June 8, 1948, the case was concluded.)

Filed T.C.U.S. July 23, 1948. [270]

The Tax Court of the United States

Docket No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER ALLOWING WITHDRAWAL OF
COUNSEL OF RECORD FOR PETITIONER

Based on motion filed herein by Spencer R. Collins, 444 Miner Building, Eugene, Oregon;

It Is Hereby Ordered, that leave be and hereby is

granted to said Spencer R. Collins to withdraw as counsel of record for the Petitioner herein.

Done this 7th day of June, 1948.

[Seal] /s/ LUTHER A. JOHNSON,
Judge.

[Title of Tax Court and Cause.]

MEMORANDUM FINDINGS OF FACT AND OPINION

Johnson, Judge:

The Commissioner determined the following deficiencies in petitioner's income tax, declared value excess-profits tax and excess profits tax and penalties:

Year	Income Tax	Declared Value Excess-Profits Tax	Excess Profits Tax	Penalties
1942.....	\$1,394.61	\$ 373.11	\$.....	\$.....
1943.....	3,120.38	3,778.43	11,311.08	2,827.77
1944.....	4,532.68	6,565.25	24,562.88	6,140.72

He included in the petitioner corporation's income the profits of a partnership formed in 1941 by the shareholders and their spouses to conduct petitioners' business with current assets acquired from petitioner for their note and their assumption of certain obligations of petitioner, on premises which petitioner leased to them. Petitioner assails the determination that the partnership and conveyances were shams which should not be recognized for tax

purposes; assails the disallowance of a net operating loss carry-over from 1941; computed under the theory that the partnership was recognizable, and assails the determination of delinquency penalties for its failure to file excess profits tax returns for 1943 and 1944.

FINDINGS OF FACT

Petitioner, an Oregon corporation with principal office at Eugene, Oregon, filed its income and declared value excess-profits tax returns for the years 1942, 1943 and 1944 with the collector of internal revenue for the district of Oregon. It was organized in 1924 and engaged in the sale of lumber and builders supplies at Eugene and Junction City, Oregon, and until 1937 at Cottage Grove, Oregon. In 1941 it had outstanding 946 shares of stock of a par value of \$94,600, or \$100 each. Half of these shares were owned by John J. Rogers, petitioner's president, and the other half were owned by Louis C. Scharpf, petitioner's secretary-treasurer, and his wife, Eva M. Scharpf, in the amounts of 35.3 and 437.7 shares, respectively. Two of the Scharpf shares were held in the name of E. R. Bryson, an attorney, to qualify him as a director with Rogers and Scharpf. Eva M. Scharpf purchased her shares at various times with funds inherited from her father. She and Rogers had acquired most of their shares before 1930.

During the years 1935-1940 petitioner's books showed assets which were carried at total values ranging from \$117,283.26 in 1938 to \$150,531.66 in 1940. These assets consisted chiefly of merchandise

inventory and accounts receivable and in addition there were buildings, furniture and fixtures which had a book value of about \$37,000. During 1935-1940 petitioner sustained small operating losses, but receipts from other sources produced net incomes of a little over \$2,000 for 1936, 1937 and 1939, \$677.05 for 1935, and \$6,036.35 for 1940. As officers, Rogers and Scharpf received equal salaries which, combined, ranged from \$9,800 in 1937 to \$14,400 in 1940. Both were actively engaged in the conduct of petitioner's business; Rogers purchased stocks of lumber, shingles, molding and coal and had charge of credit and collections; Scharpf made purchases of all other building materials handled. Their wives rendered no services.

In the latter part of 1939 Scharpf suggested to Rogers that the business be conducted as a partnership. Rogers was not agreeable to the change, being reluctant to assume the unlimited liability of a partner. Scharpf persisted, however, and during 1940 both had a number of conferences with Bryson, the attorney, who had given them advice for many years. The attorney recommended acceptance of a plan to which Rogers finally assented, and pursuant thereto Rogers, Scharpf and their wives made a partnership agreement as of January 1, 1941, whereby the four were to conduct the business as equal partners with operating assets which petitioner was to transfer to them and on premises which petitioner was to retain and rent to them.

At the close of 1940 petitioner's balance sheet showed the following assets and liabilities:

Assets	
Cash	\$ 243.96
Notes & Accounts Receivable.....	37,477.76
Merchandise	70,892.48
Investments	2,926.09
Land	23,993.25
Buildings	\$26,276.49
Furniture	6,959.28
Trucks	5,239.49
	<hr/>
	\$38,475.26
Less: Depreciation	23,653.78
	<hr/>
	14,821.48
Prepaid Insurance	176.64
	<hr/>
Total	\$150,531.66

Liabilities	
Accounts Payable	\$ 16,271.55
Notes Payable	34,238.00
Accrued Taxes	3,001.89
Earned Surplus	2,420.22
Capital Stock	94,600.00
	<hr/>
Total	\$150,531.66

The accounts or notes payable comprised \$2,144 due Rogers, of which \$1,200 was salary and \$944 dividends; \$1,270.60 due Scharpf, of which \$1,200 was salary and \$70.60 dividends; a note for \$1,500 due Corabelle M. Rogers, and a dividend of \$873.40 due Eva M. Scharpf. Petitioner's land and buildings consisted of town lots at Eugene; improved with a concrete building and hydraulic elevator, a large frame building, a storage shed and spur railway track; two lots at Junction City improved with a hollow tile warehouse and a wooden shed, and an old warehouse and vacant lots at Cottage Grove. The

State Highway Commission had drafted plans to run a new highway across the principal property at Eugene, but later changed the highway routing. Petitioner also occupied leased premises. About nine-tenths of its sales were made at Eugene; one-tenth at Junction City, and the Cottage Grove property was sometimes rented, but produced little income.

Pursuant to the plan agreed upon for the formation of a partnership petitioner's directors on January 2, 1941, resolved to change petitioner's name from Twin Oaks Builders Supply Company to Twin Oaks Company and to accept the offer of Rogers, Scharpf and their wives to acquire its current assets at book values in consideration of their assumption of its accounts payable and their 2 per cent note for the balance; to lease to them its fixed assets, and to discontinue its builders supply business. On January 25, but as of January 1, 1941, Rogers, Scharpf and their wives each signed a partnership agreement, declaring their intention to associate themselves together as copartners under the firm name of Twin Oaks Builders Supply Company for purchasing from petitioner, which then had the same name, all its assets except real estate, fixtures and equipment and for leasing the latter. It was agreed that each contribute \$2,000 and share equally in profits and losses; that the partnership engage in the same business as that previously conducted by petitioner; that such business be conducted by Rogers and Scharpf, each performing "the work

heretofore by him performed” and each being entitled to a salary in addition to his share of the profits; that a bank account be opened in the partnership’s name against which checks could be drawn by Rogers or Scharpf or by “some person to whom they may jointly in writing delegate such power”.

Each of the partners shall have an equal voice in the control of the business and the affairs of the copartnership and in the decision of any questions which may arise.

The duration of the agreement was not limited in time, but either pair of spouses desiring dissolution was required to notify the other pair and offer to purchase the others’ interest not only in the partnership but also in petitioner’s stock, and to assume the indebtedness of both firms. On acceptance of the offer the sellers were to agree not to engage in the same business in the area for four years. If the offer should not be accepted within 90 days, the offering spouses could require a termination and liquidation of the partnership. For the purposes of these provisions each pair of spouses “shall be deemed as one copartner”. Upon the death of a wife the surviving husband was bound to purchase her interest in the partnership and the corporation for a price determinable by reference to book value. Upon the death of a husband the surviving husband and his spouse had a 90-day option to purchase the interests of both the others on like terms. These terms provided for installment payments with security and the arbitration of disputes. By a contract

of May 31, 1938, Rogers, as party of the first part and owner of one-half of petitioner's shares, and Scharpf and wife, as parties of the second part and owners of the other half, had agreed that upon the death of either husband, the survivor should have the right to acquire the other party's stock in petitioner on like terms. By a "Supplement to Partnership Agreement", signed January 30, 1941, it was recited that Corabelle M. Rogers and Eva M. Scharpf "render and are expected to continue to render some personal services to the partnership" and it was agreed that each "be paid a salary of \$25.00 per month", regardless of profits and losses for the services which were to be performed "at their convenience".

On January 2, 1941, Rogers, Scharpf and their wives signed a certificate of their intention to conduct a lumber and building supplies business at Eugene and Junction City, Oregon, under the assumed name of Twin Oaks Builders Supply Company, and filed it in the public records of Lane County, Oregon, on January 18. The partnership, by Rogers, gave to petitioner its note, dated January 2, 1941, in the amount of \$89,378.35 payable in one year with 2 per cent interest. This amount represented the excess of the book value of current assets covered by the purchase offer above the accounts payable which the partnership was to assume. As of January 1, 1941, entries were made in petitioner's books indicating the transfer of its cash, notes and accounts receivable, merchandise, investments of

\$2,726.09, and delivery equipment of \$1,809.61 to the partnership, and the elimination of \$16,271.55 and \$7,500 of accounts and notes payable, respectively, from its liabilities.

As of the same date books were opened in the name of the partnership, indicating as its assets the cash, notes and accounts receivable, the merchandise, investments and delivery equipment in the same amounts transferred from petitioner's books and also an account receivable of \$500 from Rogers. Liabilities were shown as accounts payable of \$16,271.55, notes payable of \$89,378.35, and "partners' investment accounts" of \$8,000. The \$8,000, representing the \$2,000 contribution of each partner required by the agreement, was provided largely by the cancellation of amounts owed to them or to members of their families by petitioner on account of unpaid salary, dividends and monies advanced.

By a written agreement dated January 2, 1941, petitioner leased to the partnership all its remaining assets, consisting of the real properties, fixtures and equipment, for \$3,000 a year. The partnership on the same date filed with the State Industrial Accident Commission a "notice of engaging in hazardous occupation" and of employing 25 workmen on an estimated monthly pay roll of \$2,600. It registered with the State Unemployment Compensation Commission and filed required reports thereafter. It applied for and received a registration number under the Social Security Act. It advised the First National Bank of Eugene about petitioner's transfer

of assets to it, and opened an account with the bank from which each of the four partners was authorized to withdraw funds. It served formal notice on the bank in December 1944 that each of them had power to act for the firm in borrowing money, making and endorsing notes and in transferring assets.

After January 1941 the lumber and builders supply business was conducted by Rogers and Scharpf as before; the partnership bore the same name that petitioner had formerly borne; made contracts and transacted business in that name, and taxes were assessed against it in that name. There were no changes obvious to customers except the elimination of officers' names on stationery. The wives of Rogers and Scharpf, who had rendered no services before, sometimes signed pay roll checks and notes and listed accounts receivable once a month. Separate bank accounts and separate books were maintained for petitioner corporation and for the partnership. Petitioner's activities, as recorded, were limited to the owning and leasing of real estate and equipment. Its income for the years 1941-1944 consisted of the \$3,000 rent and interest on the note of the partnership and some very petty miscellaneous items. Its books indicated a loss of \$904 in 1941 and net incomes of a few hundred dollars for the succeeding years. In July 1941 it bought a lot and old frame residence adjoining its property in Eugene for between \$3,500 and \$4,000 and demolished the building. The lot has since been used in the builders supply business for storage. In

December 1943 it bought another lot and residence in Eugene for \$2,500. The property was then rented for \$66 a month; the tenant remained in possession and thereafter paid the rent to the partnership. In 1946 and 1947 the partnership paid \$4,200 to petitioner as rent. The books of the partnership indicate the following gross and net incomes for the years indicated:

Year	Gross Income	Net Income
1941	\$375,587.51	\$29,776.20
1942	262,931.20	18,525.29
1943	356,930.54	42,086.52
1944	512,001.16	66,119.33

The net income was each year credited on the partnership books to the partners' accounts, \$6,600 being credited to each husband as salary; \$300 to each wife as such and the remainder divided among them in equal parts. The partnership paid petitioner the \$89,378.35 due on the note plus 2 per cent interest thereon in annual installments ending in December 1946, using earnings and the proceeds of property sales. The partnership has endorsed petitioner's notes for bank loans.

For the years 1941-1944 corporation income and declared value excess-profits tax returns were filed for petitioner and separate partnership returns for the partnership. Petitioner filed no excess profits tax returns for 1943 and 1944. The Commissioner determined deficiencies in petitioner's income and declared value excess-profits taxes for 1942, 1943 and

1944, and in excess profits taxes for 1943 and 1944 by including in petitioner's income the profits reported by the partnership, with certain adjustments, under the view that the partnership, transfers of assets and leases to it were without substance and should be disregarded for Federal tax purposes. For the same reason petitioner's reported operating loss of 1941 was not allowed as a carry-over for 1942. Penalties were determined for petitioner's failure to file excess profits tax returns for 1943 and 1944.

OPINION

Petitioner charges respondent with error in refusing to recognize for tax purposes the existence of a partnership under the agreement of January 1, 1941, and in including partnership profits for the years 1942, 1943 and 1944 in its own income for those years. If the partnership should be recognized petitioner sustained in 1941 a net operating loss which it contends should be allowed in 1942 as a carry-over deduction. It further contends that even if the partnership was not recognizable, its contrary belief constituted reasonable cause for not filing excess profits tax returns for 1943 and 1944, and no penalty for failure to do so should be imposed under section 291, Internal Revenue Code.

Respondent defends his determinations by the argument that the technical creation of the partnership was form without substance and as such a mere device to reallocate income among family groups with resulting tax advantage in view. He

argues that the partnership was a sham which should be disregarded under the doctrine of *Helvering v. Clifford*, 309 U. S. 331, and like decisions, or in the alternative that additional amounts should be allocated to petitioner's income as adequate interest and rent under the provisions of section 45, Internal Revenue Code. He defends imposition of the penalties as warranted by the circumstances.

It is settled that a taxpayer is free to adopt such organization for his affairs as he may choose. But if the form employed is a sham without substance, it may be ignored for tax purposes. *Helvering v. Horst*, 311 U. S. 112; *Gregory v. Helvering*, 293 U. S. 465, even although valid in defining the parties' rights under state law. *Commissioner v. Tower*, 327 U. S. 280. An arrangement whereby income is spread, as here, among members of family groups invites special scrutiny. *Helvering v. Clifford*, *supra*. But each case must be decided on its own facts and those facts must be viewed as a whole.

Prior to January 1941 petitioner, as a corporation, had been engaged for many years in the purchase and sale of builders materials, including lumber. In this business, which was managed by its shareholders, Rogers and Scharpf, it used improved real estate, trucks and cash, and kept on hand a merchandise inventory. It also owned some other real property, which was rented or idle. The principal stockholder, Rogers, owned 473 shares, or half its stock; Scharpf owned 35.3 shares and Scharpf's wife owned the remaining 437.7 shares. In January

1941 Rogers and wife and Scharpf and wife, pursuant to an agreed plan, made a partnership agreement for the purpose of conducting petitioner's business as equal partners under petitioner's name. Petitioner's directors, Rogers, Scharpf and their attorney, Bryson, thereupon resolved to change petitioner's name; to sell all its assets except real estate to the partnership in consideration of the partnership's assumption of its accounts payable and the partnership's 2 per cent note in an amount which added to the liabilities assumed would equal the assets' book value. Petitioner further agreed to lease its real estate to the partnership for \$3,000 a year.

A performance of this agreement was indicated on petitioner's books by the elimination from its assets of all its cash, being \$243.96, notes and accounts receivable of \$37,477.76, merchandise inventory of \$70,892.48, investments of \$2,726.09, and delivery equipment of \$1,809.61, and the addition of a 2 per cent note receivable for \$89,378.35 from the partnership. These eliminations left it with recorded assets of the note; buildings, land and fixtures carried at \$37,005.12, a \$200 "investment" and \$176.64 prepaid insurance. From its liabilities, accounts payable of \$16,271.55 and notes payable of \$7,500 were eliminated, leaving recorded liabilities of \$26,738 notes payable and accrued taxes of \$3,001.89. As of the same date books were opened for the partnership showing exactly the same assets and values as those eliminated from petitioner's accounts and in addi-

tion an account receivable of \$500 from Rogers. As liabilities the \$89,378.35 note and accounts payable of \$16,271.55 were shown. "Partners' Investment Accounts" were recorded at \$8,000. This figure represents the \$2,000 contribution which each partner had agreed to contribute, and equals the \$7,500 notes eliminated from petitioner's liabilities plus the \$500 account receivable from Rogers.

After these initial entries separate books were kept for petitioner and the partnership. Business income was credited to the latter and after salary credits of \$6,600 each to Rogers and Scharpf, \$300 each to their wives, and a charge of \$3,000 for rent to petitioner, 25 per cent of the profits were credited to each partner. Petitioner's income, as recorded and reported, thereafter consisted of the \$3,000 rent and some interest on bonds and notes. Formalities were observed in making and paying the \$89,378.35 note with interest; in registering the partnership with tax officers and other public authorities concerned and in notifying banks. A formal lease of the real estate was executed by petitioner, and while, as respondent points out, no formal bill of sale for the assets was shown, we deem the transactions and steps for which petitioner seeks recognition adequately fortified in a technical sense.

But we do not perceive substance in these forms. After as before January 1941 the business was conducted by Rogers and Scharpf under the same name with the same assets in the same manner. No addi-

tional funds were paid in as operating capital; no assets were removed; and there was no change in policy or in managing personnel apart from the negligible services of the wives. Petitioner introduced much testimony to prove that the partners' contributions of \$2,000 each represented new capital needed, and the record is replete with details of amounts which it owed to Rogers, Scharpf and their wives on account of unpaid salary and dividends or for monies advanced, and with statements that the four "paid in" the excess above cancelled debts due them. But apparently (for the testimony is very vague) the "cash" payments were effected by the cancellation of petitioner's debts to the partners' children and the parent's payments to the child in reimbursement. At all events it is enough for our purposes that the partnership's opening balance sheet shows on hand only the amount of cash which was eliminated from petitioner's assets, and as notes payable of \$7,500 were also eliminated without appearing as a liability of the partnership, we readily infer that the \$8,000 recorded as partners' investments were provided by this cancellation and the \$500 account payable by Rogers.

It is true, as petitioner argues, that cancellation increased assets in a bookkeeping sense as did also the note for \$89,378.35. But as the note itself was paid off by earnings of the business, it seems plain that the capital contributions to the partnership and the sale price of the assets were both satisfied by bookkeeping entries conforming to a scheme which

had no substantive effect whatever on the business. And since petitioner's officers continued as business managers, it can be said here as in *R.O.H. Hills, Inc.*, 9 T.C. 153, that:

* * * the partnership contributed absolutely nothing either in services or capital to the production of the income * * *. * * * its function and purpose were merely to siphon off the greater portion of the earnings * * *.

Cf. *Ingle Coal Corporation*, 10 T.C. 1199; *Forcum-James Co.*, 7 T.C. 1195.

Petitioner's business, it should be noted further, was unitary in character and in this respect differed from the businesses considered in *Miles-Conley Co., Inc.*, 10 T.C. 754; *Buffalo Meter Co.*, 10 T.C. 83, and *Seminole Flavor Co.*, 4 T.C. 1215. In those cases recognition for tax purposes was accorded the individual proprietorship or the partnership formed by the taxpayer's shareholders for operating a severable branch of the corporation's activities. But petitioner's building supply business was not susceptible of any logical division. The real estate, to which petitioner retained title, was essential to its conduct and continued to be used in it under the form of a lease. In this respect petitioner's position is analogous to that of the taxpayer in *Broadway Strand Theatre Co.*, 12 B.T.A. 1052, wherein the Board rejected the shareholder's contention that profits of theater operation were his individual income although he had transacted business under his own name.

Petitioner properly contends, however, that even in the absence of a business purpose quoad itself as a corporation, the partnership should be recognized if its formation served the interests of its individual shareholders. *Miles-Conley Co., Inc.*, *supra*. Several personal reasons for the change were asserted. Attorney Bryson testified that Scharpf felt entitled to a more substantial interest in the business than that represented by his 35.3 shares and wished the partnership as a means of getting that interest while Rogers opposed, fearing the unlimited liability and the possibility that Scharpf would want to take in his sons. Scharpf himself said that he wanted a partnership "so that I would have a decent share of the profit"; also that under such a form of organization he could get out more readily. He expected Rogers to have a half interest, but Rogers decided to take his wife in also because, in his own words, "although I was the only member of the corporation, still it was a family affair."

This testimony, in our opinion, affirmatively supports the respondent's view that the purpose of the partnership was to achieve a reallocation of income among family groups. The result was certainly accomplished, for the interests of the three shareholders were equally divided among the four spouses. Compensation was paid for services rendered by the partners, and their note for assets was paid from future business earnings. As above shown, there was no new capital; no new services, no change in business. The only real result of the change was a

new distribution of profits, and the Commissioner was correct in refusing to recognize it for tax purposes.

This disposition makes it unnecessary to consider an application of section 45 and as all business profits are taxable to petitioner, there was no recognizable net operating loss in 1941 which should be carried over. We do not believe, however, that petitioner's officers showed a lack of prudence in failing to file excess profits tax returns for 1943 and 1944, but on the contrary that they honestly deemed the partnership recognizable for tax purposes. Since no excess profits tax returns were required under that view, they had reasonable cause for not filing any. Imposition of the penalties is not sustained. *Hugh Smith, Inc.*, 8 T.C. 660; *Estate of Frederick C. Kirchner*, 46 B.T.A 578.

Decision will be entered under Rule 50.

[Seal]

Entered Mar. 23, 1949.

Received T.C.U.S. March 17, 1949.

[Title of Tax Court and Cause.]

MOTION FOR RECONSIDERATION AND FOR
REVIEW BY THE ENTIRE COURT

The above-named petitioner, by its counsel, Ralph R. Bailey and Carl E. Davidson, hereby moves the Court that the Court reconsider its memorandum

findings of fact and opinion heretofore entered in the above-entitled case, and that the said memorandum findings of fact and opinion be reviewed by the entire court.

Memorandum setting forth the basis of this motion is filed herewith.

/s/ RALPH R. BAILEY,
723 Pittock Block,
Portland, Oregon.

/s/ CARL E. DAVIDSON,
1525 Yeon Building,
Portland, Oregon.

Counsel for Petitioner.

Served Apr. 27, 1949.

Received and filed T.C.U.S. April 19, 1949.

Denied April 25, 1949.

[Title of Tax Court and Cause.]

ORDER

The motion of the petitioner filed on April 19, 1949, insofar as it asks review by the full Court, is hereby denied.

[Seal] /s/ BOLON B. TURNER,
Presiding Judge.

Dated: Washington, D. C., April 26, 1949.

Served Apr. 27, 1949.

[Title of Tax Court and Cause.]

RESPONDENT'S COMPUTATION FOR
ENTRY OF DECISION

The attached proposed computation is submitted, on behalf of the respondent, to the Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Tax Court, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Tax Court, pursuant to the statutes in such cases made and provided.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

WILFORD H. PAYNE,
Division Counsel.

JOHN H. PIGG,
Special Attorney,
Bureau of Internal Revenue.

C-TS:NWD:RECOMP.

P:JHP:MHB

Audit Statement

Petitioner: Twin Oaks Company
669 High Street
Eugene, Oregon

Docket No. : 16845

Tax Liability for the Taxable Years Ended December 31, 1942,
December 31, 1943 and December 31, 1944

Year	Declared Value Liability	Excess-Profits Tax Assessed	Deficiency
1942	\$ 373.11	\$ none	\$ 373.11
1943	3,778.43	none	3,778.43
1944	6,565.25	none	6,565.25
Totals	<u>\$10,716.79</u>	<u>\$ none</u>	<u>\$10,716.79</u>

	Income Tax		
1942	\$ 1,394.61	\$ none	\$ 1,394.61
1943	3,305.23	184.85	3,120.38
1944	4,672.53	139.85	4,532.68
Totals	<u>\$ 9,372.37</u>	<u>\$324.70</u>	<u>\$ 9,047.67</u>

	Excess Profits Tax		
1943	\$11,311.08	\$ none	\$11,311.08
1944	24,562.88	none	24,562.88
Totals	<u>\$35,873.96</u>	<u>\$ none</u>	<u>\$35,873.96</u>

Recomputation of tax liability prepared in accordance with
the memorandum opinion of The Tax Court of the United States
entered March 23, 1949.

Taxable Year Ended December 31, 1942

Schedule 1

Adjustment to Income

Net income disclosed by deficiency letter dated October 3, 1947	\$ 5,951.57
Net income as adjusted pursuant to the memorandum opinion of The Tax Court of the United States en- tered March 23, 1949.....	5,951.57
Adjustment	No Change

Schedule 2

Computation of Tax

Declared value excess-profits tax liability disclosed by deficiency letter	\$ 373.11
Declared value excess-profits tax assessed :	
Original account No. NC 41023.....	none
Deficiency in declared value excess-profits tax.....	\$ 373.11
Income tax liability disclosed by deficiency letter.....	\$ 1,394.61
Income tax assessed :	
Original account number NC 41023.....	none
Deficiency in income tax.....	\$ 1,394.61

Taxable Year Ended December 31, 1943

Schedule 3

Adjustment to Income

Net income disclosed by deficiency letter dated October 3, 1947	\$29,874.50
Net income as adjusted pursuant to the memorandum opinion of The Tax Court of the United States en- tered March 23, 1949.....	29,874.50
Adjustment	No Change

Schedule 4
Computation of Tax

Declared Value Excess-Profits Tax

Declared value excess-profits tax disclosed by
deficiency letter\$ 3,778.43

Declared value excess-profits tax assessed :

Original account number 420506..... none

Deficiency in declared value excess-profits tax.....\$ 3,778.43

Income Tax

Income tax liability disclosed by deficiency letter.....\$ 3,305.23

Income tax assessed :

Original account number 420506..... 184.85

Deficiency in income tax.....\$ 3,120.38

Excess Profits Tax

Excess profits tax disclosed by deficiency letter.....\$11,311.08

Excess profits tax assessed (no return filed)..... none

Deficiency in excess profits tax.....\$11,311.08

Pursuant to the opinion of The Tax Court of the United States,
the petitioner is not liable for a delinquency penalty for failure to
file an excess profits tax return.

Taxable Year Ended December 31, 1944

Schedule 5
Adjustment to Income

Net income disclosed by deficiency letter dated

October 3, 1947\$52,978.44

Net income as adjusted pursuant to the memorandum

opinion of The Tax Court of the United States en-

tered March 23, 1949..... 52,978.44

AdjustmentNo Change

Schedule 6
Computation of Tax

Declared Value Excess-Profits Tax

Declared value excess-profits tax disclosed by

deficiency letter	\$ 6,565.25
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Declared value excess-profits tax assessed :

Original account number 4200582.....	none
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Deficiency in declared value excess-profits tax.....	\$ 6,565.25
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Income Tax

Income tax liability disclosed by deficiency letter.....	\$ 4,672.53
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Income tax assessed :

Original account number 4200582.....	139.85
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Deficiency in income tax.....	\$ 4,532.68
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Excess Profits Tax

Excess profits tax disclosed by deficiency letter.....	\$24,562.88
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Excess profits tax assessed :

Original account number (no return filed).....	none
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Deficiency in excess profits tax.....	\$24,562.88
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Pursuant to the opinion of The Tax Court of the United States, the petitioner is not liable for a delinquency penalty for failure to file an excess profits tax return.

Received and Filed T.C.U.S. May 12, 1949.

[Title of Tax Court and Cause.]

PETITIONER'S COMPUTATION FOR ENTRY OF DECISION

The attached proposed computation is submitted on behalf of the petitioner to The Tax Court of the United States in compliance with its opinion determining the issues in this proceeding.

This computation is submitted without prejudice to the petitioner's right to contest the correctness of the decision entered herein by The Tax Court, pursuant to the statutes in such cases made and provided.

In its memorandum of facts and opinion the Court made two ultimate findings of fact, namely:

(1). That titles to all of the assets theretofore issued by the petitioner in its business with the exception of its real property were transferred to John J. Rogers, Corabelle M. Rogers, Louis C. Scharpf and Eva M. Scharpf, and said assets were used by them in the conduct of business previously carried on by the corporation, and

(2). The re-allocation of income resulting from transfer to the partnership and carrying on by the partnership of its business may not be recognized for tax purposes and all of the income of the business is therefore to be attributed to the corporation.

In view of these conflicting ultimate findings we are attaching hereto alternative computations under each of the said findings.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,

Counsel for Petitioner.

Copy served 5/18/49.

Recomputation Statement

Petitioner,
Twin Oaks Company.

Docket No. 16845.

(1). Recomputation of tax under alternative finding of fact (1) :

Year	Income Tax	Declared Value Excess Profits Tax	Excess Profits Tax	Penalties
1942	0	0	0	0
1943	0	0	0	0
1944	0	0	0	0

(2). Recomputation of tax under alternative finding of fact (2) :

Year	Income Tax	Declared Value Excess Profits Tax	Excess Profits Tax	Penalties
1942	1394.61	373.11	0	0
1943	3835.12	3778.43	8928.61	0
1944	5926.03	6565.25	20,311.49	0

Computations upon which deficiencies under alternative finding of fact (2) are attached hereto as Exhibit A hereof. If computation of deficiencies is made under alternative finding of fact (2), the respondent moves that the Court order the respondent to credit against the said deficiencies the amounts of income tax paid on income of the partnership in excess of the amounts allowed by the respondent as salaries.

EXHIBIT A-1.

Twin Oaks Company

Summary of Federal Income and Excess Profits Taxes and Deficiencies

Income tax—	Recomputed Liability	Assessed	Deficiency
1942	1,394.61	None	1,394.61
1943	4,019.97	184.85	3,835.12
1944	6,065.88	139.85	5,926.03
	<hr/> 11,480.46	<hr/> 324.70	<hr/> 11,155.76

Declared value excess-profits tax—			
1942	373.11	None	373.11
1943	3,778.43	None	3,778.43
1944	6,565.25	None	6,565.25
	<hr/> 10,716.79	<hr/> None	<hr/> 10,716.79

Federal excess profits tax—

1942	None	None	None
1943	8,928.61	None	*8,928.61
1944	20,311.49	None	20,311.49
	<u>29,240.10</u>	<u>None</u>	<u>29,240.10</u>
Total	<u>\$51,437.35</u>	<u>\$324.70</u>	<u>\$51,112.65</u>

* Additional \$150.70 to be allowed by Collector for balance of post-war refund not eliminated by credit for debt retirement.

EXHIBIT A-2.

Twin Oaks Company

Computation of 1942 Federal Income and Excess Profits Taxes

Net Income for the Year:

Income transferred from Twin Oaks Builders Supply Co.	18,525.29
Add—Income reported by Twin Oaks Company on return filed, before net operating loss deduction.....	656.28
	<u>19,181.57</u>

Less—Salaries to John J. Rogers and

Louis C. Sharpf 13,200.00

—Long-term capital loss shown on return filed by Twin Oaks Company used as off- set against \$621.63 long-term capital gain transferred from partnership.....	30.00	13,230.00
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Net income for declared value excess-profits tax..... 5,951.57

Less—Declared value excess profits tax, as below..... 373.11

Net income..... 5,578.46

Less—Income subject to excess profits tax..... None

Normal tax net income, regular method..... 5,578.46

Less—Long-term capital gain..... 591.63

Normal tax net income, alternative computation..... \$ 4,986.83

Income and Declared Value Excess Profits Tax:		Income	Tax
Declared value excess profits tax—			
Net income as above.....	5,951.57		
Less—10% of \$25,000.00 declared value of capital stock	2,500.00		
	<u>3,451.57</u>		
Subject to tax.....	\$ 3,451.57		
	<u>1,250.00</u>		82.50
Taxable at 6.6%.....	1,250.00		
Taxable at 13.2%.....	2,201.57		290.61
	<u>3,451.57</u>		<u>373.11</u>
Subject to tax and tax thereon, also deficiency	\$ 3,451.57	\$	373.11
	<u>3,451.57</u>		<u>373.11</u>
Combined normal tax and surtax—			
Alternative tax computation—25% of \$5,578.46			
normal tax net income, also deficiency.....		\$	1,394.61
			<u>1,394.61</u>
Excess Profits Tax:			
Net income after declared value excess profits tax.....			5,578.46
Add—50% of \$638.84 interest on borrowed capital.....			319.42
			<u>5,897.88</u>
Less—Long-term capital gain.....			591.63
			<u>5,306.25</u>
Excess profits net income.....			5,306.25
Less—Specific exemption	5,000.00		
—Excess profits credit.....	10,282.16		15,282.16
	<u>10,282.16</u>		<u>15,282.16</u>
Adjusted excess profits net income.....			None
			<u>None</u>
Excess profits credit as above.....	10,282.16		
Less—Excess profits net income as above.....	5,306.25		
	<u>4,975.91</u>		
Unused excess profits credit and carryback to year 1941.....	\$ 4,975.91		
	<u>4,975.91</u>		

EXHIBIT A-3.

Twin Oaks Company

Computation of 1943 Federal Income and Excess Profits Taxes

Net Income for the Year:

Net income per return filed by Twin Oaks Company before deduction of \$248.55 net operating loss deduction..	987.98
Add—Net income of Twin Oaks Builders Supply Co. per return filed	42,086.52
	<u>43,074.50</u>
Less—Salaries of John J. Rogers and Louis C. Scharpf.....	13,200.00
Net income as adjusted.....	<u><u>\$29,874.50</u></u>

Declared Value Excess-Profits Tax:

	Amount	Tax
Net income as above.....	29,874.50	
Less—10% of \$10,000.00 declared value of capital stock	1,000.00	
Balance subject to tax	<u>\$28,874.50</u>	
Taxable at 6.6% (5% of \$10,000.00).....	500.00	33.00
Taxable at 13.2 %.....	28,374.50	3,745.43
Total, also deficiency in tax.....	<u><u>\$28,874.50</u></u>	<u><u>\$ 3,778.43</u></u>

Normal Tax and Surtax:

Net income for declared value excess-profits tax	29,874.50	
Less—Declared value excess-profits tax	3,778.43	
—Income subject to excess profits tax as below.....	10,836.92	14,615.35
Normal and surtax net income.....	<u>\$15,259.15</u>	
Taxable at 25%.....	5,000.00	1,250.00
Taxable at 27%.....	10,259.15	2,769.97
Total	<u><u>\$15,259.15</u></u>	<u><u>4,019.97</u></u>
Less—Assessed on return filed.....		184.85
Deficiency		<u><u>\$ 3,835.12</u></u>

Excess Profits Tax:

Net income as above.....	29,874.50	
Less—Declared value excess-profits tax.....	3,778.43	
Adjusted net income	26,096.07	
Add—50% of \$58.31 interest on borrowed capital	29.16	
Excess profits net income.....	26,125.23	
Less—Specific exemption	5,000.00	
—Excess profits credit.....	10,288.31	15,288.31
Adjusted excess profits net income.....	\$10,836.92	
Tax thereon at 90%.....		9,753.23
Less—Credit for debt retirement—40% of \$2,061.54		824.62
Excess profits tax due, also deficiency.....		\$ 8,928.61

EXHIBIT A-4**Twin Oaks Company****Computation of 1944 Federal Income and Excess Profits Taxes****Net Income for the Year:**

Net income per return filed by Twin Oaks Company.....	559.42	
Add—Net income of Twin Oaks Builders Supply Co. per return filed.....	65,619.02	
	66,178.44	
Less—Salaries of John J. Rogers and Louis C. Scharpf.....	13,200.00	
Net income as adjusted including \$116.67 net long-term capital gain.....	\$52,978.44	

Declared Value Excess-Profits Tax:

	Amount	Tax
Net income as above.....	52,978.44	
Less—Long-term capital gain.....	116.67	
—10% of \$25,000.00 declared value of capital stock.....	2,500.00	2,616.67
Balance subject to tax.....	\$50,361.77	
Taxable at 6.6% (5% of \$25,000.00).....	1,250.00	82.50
Taxable at 13.2%.....	49,111.77	6,482.75
Total, also deficiency in tax.....	\$50,361.77	\$ 6,565.25

Normal Tax and Surtax:

Alternative computation—

Net income as above.....	52,978.44	
Less—Net long-term capital gain..	116.67	29.17
—Declared value excess-		
profits tax	6,565.25	
—Income subject to excess		
profits tax as below.....	23,756.13	30,438.05
Normal and surtax net income.....	\$22,540.39	
Taxable at 25%.....	5,000.00	1,250.00
Taxable at 27%.....	15,000.00	4,050.00
Taxable at 29%.....	2,540.39	736.71
Total—	\$22,540.39	6,065.88
Less—Assessed on return filed.....		139.85
Deficiency		\$ 5,926.03

Excess Profits Tax:

Net income as above.....	52,978.44	
Less—Declared value excess-profits tax	6,565.25	
Adjusted net income.....	46,413.19	
Add—50% of interest on borrowed capital.....	None	
	46,413.19	
Less—Long-term capital gain.....	116.67	
Excess profits net income.....	46,296.52	
Less—Specific exemption	10,000.00	
—Excess profits credit.....	12,540.39	22,540.39
Adjusted excess profits net income and		
tax at 95% thereof.....	\$23,756.13	22,568.32
Less—Current credit at 10%.....		2,256.83
Excess profits tax, also deficiency in tax.....		\$20,311.49

EXHIBIT A-5.

Twin Oaks Company

Analysis of Partners' Capital Investment Accounts in Twin Oaks Builders Supply Co.

Year 1941

	John J. Rogers	Corabelle M. Rogers	L. C. Scharpf	Eva M. Scharpf	Total
Jan. 1 Balance	2,000.00	2,000.00	2,000.00	2,000.00	8,000.00
Dec. 31 Shares of income.....	10,594.05	4,294.05	10,594.05	4,294.05	29,776.20
Total	12,594.05	6,294.05	12,594.05	6,294.05	37,776.20
Withdrawals	6,600.00	300.00	6,600.00	300.00	13,800.00
Balance	5,994.05	5,994.05	5,994.05	5,994.05	23,976.20

Year 1942

Dec. 31 Shares of income.....	7,781.33	1,481.32	7,781.32	1,481.32	18,525.29
Total	13,775.38	7,475.37	13,775.37	7,475.37	42,501.49
Withdrawals	7,913.50	1,613.50	7,913.50	1,613.50	19,054.00
Balance	5,861.88	5,861.87	5,861.87	5,861.87	23,447.49

Twin Oaks Company vs.

Year 1943

Dec. 31	Shares of income.....	13,671.63	7,371.63	13,671.63	7,371.63	42,086.52
	Total	19,533.51	13,233.50	19,533.50	13,233.50	65,534.01
	Withdrawals	9,220.75	2,920.74	9,220.74	2,920.74	24,282.97
	Balance	10,312.76	10,312.76	10,312.76	10,312.76	41,251.04
Year 1944						
Dec. 31	Shares of income.....	19,554.76	13,254.75	19,554.76	13,254.75	65,619.02
	Total	29,867.52	23,567.51	29,867.52	23,567.51	106,870.06
	Withdrawals	15,950.00	9,650.00	15,950.00	9,650.00	51,200.00
	Balance	\$13,917.52	\$13,917.51	\$13,917.52	\$13,917.51	\$55,670.06

EXHIBIT A-6.

Twin Oaks Company

Summary Balance Sheets as at December 31, 1941, 1942, and 1943

Summary balance sheets give effect to consolidation of the December 31 balance sheets of Twin Oaks Company and Twin Oaks Builders Supply Co. as set out on the corporation's income tax return and the partnership return of income filed for each of the calendar years 1941, 1942, and 1943. Such consolidated figures, besides eliminating the balance shown as owing to Twin Oaks Company by Twin Oaks Builders Supply Co. have been adjusted only to reflect the adjusted accumulated earnings and surplus as per the attached schedule and to reflect as an advance to stockholders the excess of amounts withdrawn by them over the \$13,200.00 as total of annual salaries of John J. Rogers and Louis C. Scharpf. The summary consolidated balance sheets are set out as follows:

Assets	12-31-41	12-31-42	12-31-43
Cash on hand and in banks.....	1,349.15	1,175.54	10,639.45
Accounts and notes receivable.....	39,223.55	13,336.72	25,295.07
Merchandise inventory	71,308.78	62,931.92	70,804.31
Investments	200.00	100.00	2,100.00
Land	30,209.57	30,209.57	32,709.57
Depreciable assets at net book value	16,287.44	15,694.70	16,077.90
Deferred charges	188.65	356.59	286.14
Advances to stockholders.....	600.00	6,454.00	17,536.97
Total assets	<u>\$159,367.14</u>	<u>\$130,259.04</u>	<u>\$175,449.41</u>
Liabilities and Capital			
Accounts payable	11,313.59	1,670.20	20,529.12
Notes payable	25,641.84	2,061.54	
Accrued taxes	1,460.66	570.68	220.02
Total liabilities	<u>38,416.09</u>	<u>4,302.42</u>	<u>20,749.14</u>
Capital stock	94,600.00	94,600.00	94,600.00
Contribution to capital	8,000.00	8,000.00	8,000.00
Accumulated earnings and profits	18,351.05	23,356.62	52,100.27
Total capital	<u>120,951.05</u>	<u>125,956.62</u>	<u>154,700.27</u>
Total liabilities and capital....	<u>\$159,367.14</u>	<u>\$130,259.04</u>	<u>\$175,449.41</u>

EXHIBIT A-7.

Twin Oaks Company

Summary of Excess Profits Tax Credit Based on Invested Capital

	Year 1942	Year 1943	Year 1944
Equity invested capital at beginning of the taxable year—			
Money paid in for stock.....	94,600.00	94,600.00	94,600.00
Contribution of capital, being original investments of partners to capital of Twin Oaks Builders Supply Co. added pursuant to decision of Court	8,000.00	8,000.00	8,000.00
25% of new capital contributed on above basis.....	2,000.00	2,000.00	2,000.00
Accumulated earnings and prof- its as per summary thereof and as per attached balance sheets	18,351.05	23,356.62	52,100.27
Average equity invested capital	122,951.05	127,956.62	156,700.27
Average borrowed invested capital, being 50% of average borrowed capital per schedules thereof.....	5,575.95	647.30	54.65
Invested capital	\$128,527.00	\$128,603.92	\$156,754.92
Excess profits credit—			
8% thereof	\$ 10,282.16	\$ 10,288.31	\$ 12,540.39

EXHIBIT A-8.

Twin Oaks Company

Accumulated Earnings and Profits of Twin Oaks Company at
December 31, 1941, 1942, and 1943

	Accumulated Earnings and Profits as at		
	12-31-41	12-31-42	12-31-43
Net income of partnership reported on Form 1065 by Twin Oaks Builders Supply Co. less salaries of John J. Rogers and Louis C. Scharpf in the total amount of \$13,200.00 in each year—			
Year 1941 (\$29,776.20 less \$13,200.00)	16,576.20	16,576.20	16,576.20
Year 1942 (\$18,525.29 less \$13,200.00)		5,325.29	5,325.29
Year 1943 (\$42,086.52 less \$13,200.00)			28,886.52
Adjustment to 1936 R.A.R. in re depreciation credited to surplus in 1942	212.76		
Adjustment of 1942 capital stock tax charged to surplus in 1942.....	*1.25		
Net increase in accumulated earnings and profits of Twin Oaks Company.....	16,787.71	21,901.49	50,788.01
Add—Accumulated earnings and surplus of Twin Oaks Company per corporation's income tax returns filed.....	1,563.34	1,455.13	1,312.26
Accumulated earnings and profits as adjusted, under second alternative calculation	\$18,351.05	\$23,356.62	\$52,100.27

* Figures in red.

EXHIBIT A-9.

Twin Oaks Company

Computation of Average Borrowed Capital (.00 omitted), Page 1

Year 1942	Date	Changes		Balance	Days	Amount
		Decrease	Increase			
Note, Robert Ross Rogers	1- 1			100	230	23,000
	8-18	100		None		
Note, Jack Rogers	1- 1			700	230	161,000
	8-18	700		None		
Note, George L. Scharpf	1- 1			2,471	230	568,330
	8-18	471		2,000	32	64,000
	9-19	2,000		None		
Note, Wm. L. Scharpf	1- 1			2,473	230	568,790
	8-18	473		2,000	4	8,000
	8-22	1,000		1,000	32	32,000
	9-23	1,000		None		
Note, The First National Bank of Eugene	1- 1			17,500	13	227,500
	1-13	1,000		16,500	2	33,000
	1-15	1,000		15,500	1	15,500
	1-16	1,250		14,250	1	14,250
	1-17	1,000		13,250	9	119,250

Date	Changes Decrease	Increase	Balance	Days	Amount
1-26	750		12,500	44	550,000
3-11		2,500	15,000	8	120,000
3-19		2,000	17,000	6	102,000
3-25	3,000		14,000	6	84,000
3-31	1,000		13,000	21	273,000
4-21	1,500		11,500	2	23,000
4-23	1,500		10,000	2	20,000
4-25	4,000		6,000	4	24,000
4-29		1,000	7,000	2	14,000
5- 1		500	7,500	11	82,500
5-12	1,500		6,000	2	12,000
5-14	800		5,200	7	36,400
5-21	800		4,400	2	8,800
5-23	400		4,000	4	16,000
5-27	500		3,500	2	7,000
5-29	600		2,900	14	40,600
6-12	2,900		None		
Carried forward—					3,247,920

EXHIBIT A-10.

Twin Oaks Company

Computation of Average Borrowed Capital (.00 omitted), Page 2

Year 1942	Date	Changes		Balance	Days	Amount
		Decrease	Increase			
H.O.L.C. Loan	Brought forward—					
	1- 1			2,398	26	3,247,920
	1-26	26		2,372	30	62,348
	2-25	26		2,346	30	71,160
	3-27	26		2,320	45	70,380
	5-11	26		2,294	30	104,400
	6-10	26		2,268	27	68,820
	7- 7	26		2,242	31	61,236
	8- 7	26		2,216	25	69,502
	9- 1	26		2,190	31	55,400
	10- 2	26		2,164	32	67,890
	11- 3	26		2,138	1	69,248
	11- 4	23		2,115	28	2,138
	12- 2	27		2,088	29	59,220
12-31	26		2,062		60,552	
	Total—					<u>\$4,070,214</u>
	Average borrowed capital—1/365 thereof					<u>\$ 11,152</u>
	Average borrowed invested capital—50% thereof					<u>\$ 5,576</u>

Year 1943
H.O.L.C. Loan

Date	Changes		Balance	Days	Amount
	Decrease	Increase			
1- 1			2,062	30	61,860
1-30	27		2,035	30	61,050
3- 1	27		2,008	29	58,232
3-30	27		1,981	32	63,392
5- 1	27		1,954	31	60,574
6- 1	27		1,927	30	57,810
7- 1	27		1,900	39	74,100
8- 9	26		1,874	19	35,606
8-28	1,874		None		

Total—

\$ 472,624

Average borrowed capital—1/365 thereof

\$ 1,295

Average borrowed invested capital—50% thereof

\$ 647

Year 1944
Note, The First National
Bank of Eugene

12-27	10,000	10,000	4	\$ 40,000
Average borrowed capital—1/366 thereof				<u>\$ 109</u>
Average borrowed invested capital—50% thereof				<u>\$ 55</u>

Filed: T.C.U.S. May 16, 1949.

[Title of Tax Court and Cause.]

AFFIDAVIT OF CARL E. DAVIDSON IN
SUPPORT OF PETITIONER'S COMPU-
TATION FOR ENTRY OF DECISION
UNDER RULE 50

State of Oregon,
County of Multnomah—ss.

I, Carl E. Davidson, being first duly sworn, upon my oath, do say that:

I am one of counsel of record for the petitioner in the above-entitled proceeding, and that petitioner's computation for entry of decision under Rule 50 heretofore filed in this proceeding was prepared under my direction and supervision.

The recomputation of tax under alternative finding of fact (1) contained in the said computation was computed upon the basis of the findings of fact of the court as set forth in its memorandum findings of fact and opinion. The said computation was based upon the finding by the court that the title to the property employed in the business of Twin Oaks Builders Supply Co. as its inventory was transferred by the petitioner to John J. Rogers, Corabelle Rogers, Louis C. Scharpf and Eva M. Scharpf, and upon the theory that under this finding of fact the court must necessarily find that the income from property found by the court to have been transferred could not be taxed to the petitioner. The said computation under alternative finding of fact (1) is therefore computed at zero,

there being no adjustment to the petitioner's income permitted under the said finding of fact.

The petitioner's computation of penalties under alternative finding of fact (2) is based upon the court's finding of fact in its memorandum findings of fact and opinion.

Petitioner's recomputation of tax under alternative findings of fact (2) has been prepared upon the basis of the findings and opinion of the court that the income of the partnership of Twin Oaks Builders Supply Co. for the years 1942, 1943 and 1944 was taxable in its entirety to the petitioner after allowance of \$13,200.00 for officers' salaries for each of the years involved, treating long term capital gains received by the partners of Twin Oaks Builders Supply Co. as the income of the petitioner, and allowing contributions in the amount of \$500.31 made by the partners of Twin Oaks Builders Supply Co. as a deduction for the petitioner, all as set forth in detail in the notice of deficiency, a copy of which is attached to the petition. The net results of the said adjustment as to deficiencies are set forth in the memorandum findings of fact and opinion of the court. Petitioner's computations of deficiencies under alternative findings of fact (2) are explained in the following numbered paragraphs in order that they may be reconciled by the court with the deficiencies asserted by the respondent. Petitioner does not acquiesce in such computation and contends that the said finding is erroneous.

(1). Petitioner's computation of deficiencies of income tax and declared value excess profits tax under alternative findings of fact (2) for the year 1942 are the same as those determined by the respondent in his notice of deficiency and included by the court in its memorandum findings of fact and opinion.

(2). Deficiency in declared value excess profits tax in the amount of \$3778.43 for the year 1943 included by petitioner in recomputation of tax under alternative findings of fact (2) is the same as the deficiency determined by the respondent in his notice of deficiency, and in the court's memorandum findings of fact and opinion.

(3). For the year 1943 the respondent has determined deficiencies of \$3120.38 in petitioner's income tax and \$11,311.08 in the petitioner's excess profits tax, whereas the petitioner in its recomputation of tax under alternative findings of fact (2) has computed these deficiencies as \$3835.12 in income tax and \$8928.61 in excess profits tax. The differences between the computations of the petitioner and those of the respondent as to income and excess profits taxes are the result of the respondent using an excess profits tax credit based upon the assumption that there were no earnings and profits accumulated by the corporation in the year 1942, and by the failure of the respondent to add to invested capital for each of the years 1942, 1943 and 1944, the additional capital put into the business, the income of which under alternative findings of fact (2) is held to be the income of the corporation, and by the

further failure of the respondent to allow credit for borrowed invested capital for the years 1942, 1943 and 1944. The petitioner has also included in this recomputation addition to invested capital resulting from adjustments made by the revenue agent's report for the year 1936 in the amount of \$212.76, and adjustment in reduction of surplus by additional capital stock tax in the amount of \$1.25. The petitioner is entitled to use the invested capital method for computation of its excess profits tax credit for the years 1942, 1943 and 1944. In the calendar year 1941, the net increase of the petitioner's earnings and profits under the theory that all of the income of Twin Oaks Builders Supply Co. was taxable to the petitioner, the petitioner had accumulated earnings and profits at the end of the year 1941 in the amount of \$18,351.05 made up of accumulated earnings and profits of the petitioner as shown on its income tax return and books, plus \$16,576.20 additional accumulated earnings and profits of the petitioner upon the theory that all income of Twin Oaks Builders Supply Co., a partnership, was taxable to the petitioner, plus adjustment in 1936 revenue agent's report in the amount of \$212.76, less adjustment of \$1.25 in capital stock tax charged to surplus, all as set forth in more detail in Exhibit A-8 attached to the petitioner's computation for entry of decision under Rule 50. The respondent has not allowed any accumulated earnings and profits at the end of 1941, 1942 and 1943, in the face of the concession of respondent's counsel at trial (Transcript, Pages 4-5) that if the income was taxable to the cor-

poration, the partners of Twin Oaks Builders Supply Co. might properly claim refund of taxes paid by them individually on such income. The respondent's computation in denying the accumulated earnings and profits is based upon the apparent theory that notwithstanding his action in asserting that the entire income from the business was taxable to the petitioner, the same income was distributed to the partners of Twin Oaks Builders Supply Co. and is taxable to them. As shown on Exhibit A-10, attached to petitioner's computation for entry of decision, petitioner should be credited for invested capital purposes with borrowed invested capital in the amount of \$11,152.00 for the year 1942, fifty per cent thereof allowable being \$5576.00. The said borrowed capital constituted borrowings by the partnership of Twin Oaks Builders Supply Co. and if the income from the business is taxable to the petitioner then petitioner is entitled to invested capital credit based upon the borrowings made for the business. In its memorandum findings of fact and opinion the court has found that, "No additional funds were paid in as operating capital." The court has further found that the petitioner was indebted to the partners of Twin Oaks Builders Supply Co. in the amount of \$7500.00, which item appeared on the books of the petitioner prior to the formation of the partnership as a liability. This amount, plus \$500.00 paid in, should therefore be regarded for purposes of calculation of excess profits tax credit under this alternative as new capital of the petitioner, and credit therefor as shown on

Exhibit A-7 attached to petitioner's recomputation should be given.

(4). For the year 1944 the petitioner's computation of income and excess profits tax under alternative findings of fact (2) are respectively, \$5926.03 income tax, and \$20,311.49 excess profits tax, whereas the respondent in his notice of deficiency has computed a deficiency in income tax of \$4532.68, and a deficiency in excess profits tax of \$24,562.88. The differences in these computations are the result of the failure of the respondent to allow excess profits tax based upon invested capital including accumulated earnings and profits, borrowed invested capital, and new capital as set forth more fully in the exhibits attached to petitioner's recomputation of tax.

(5). The court, in its memorandum findings of fact and opinion, has determined that the petitioner had reasonable cause for failing to file excess profits tax returns. In further support of such determination, it is called to the attention of the court that without the inclusion of income from operation of the business the petitioner was a personal holding company and not subject to excess profits taxes, and that the petitioner filed personal holding company returns for the years involved.

/s/ CARL E. DAVIDSON.

Subscribed and sworn to before me this 24th day of June, 1949.

[Seal] /s/ ROSE W. SHENKER,

Notary Public for Oregon.

My Commission expires: Dec. 9, 1951.

Filed T.C.U.S. June 29, 1949.

The Tax Court of the United States

Docket No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

June 29, 1949

(Met, pursuant to notice at 12:20 o'clock,
p.m.)Before: Hon. Luther A. Johnson,
Judge.

Appearances:

J. F. CONDON, JR.,

52 Wall Street,

New York 5, New York,

appearing on behalf of Petitioner.

R. C. WHITLEY,

Bureau of Internal Revenue,

appearing for the Respondent.

PROCEEDINGS

The Clerk: Docket Number 16845, Twin Oaks
Company.Mr. Whitley: If your Honor please, this comes
up on a rule 50 settlement, based on an opinion
of the Court entered March 23, 1949.

The Court: Is the opinion of the Court here available? All right, I have it, thank you.

Mr. Whitley: In that opinion—I am going to be brief—the Court decided that on page 15 of that opinion which is a mimeographed copy——

The Court: Yes.

Mr. Whitley: ——after discussing the testimony, the Court concluded that the only real result of the charge was a new distribution of the profits and the Commission was correct in refusing to recognize it for tax purposes, speaking of the Corporation, which the Respondent taxed by reason of the ground a partnership was not bona fide for tax purposes.

Then, the result was the Court says the Commissioner was correct in determining that the Corporation was taxable. One thing the Court did say the Commissioner was wrong in was inserting the 25 per cent penalty. We filed our computation on that ground showing the deficiencies as set forth in the deficiency notice.

The Petitioner has filed an alternative, and he has taken some exceptions to the computations, just what they are he will tell you in detail, but they have to do with an excess profits tax and a carryback loss, and certain things I think have something to do with the rule of the hearing. That is the Respondent's position. We have followed the opinion of the Court.

The Court: All right. We will hear from Petitioner's counsel.

Mr. Condon: If your Honor please, this is my

first appearance in this case. The only thing we have in controversy, the only thing involved is one of dollars, and how the tax liability under your Honor's decision should be computed.

We filed a detailed computation, and we would also like to file these additional affidavits explaining certain factors in connection with the computation.

The Court: Pardon me, is this just original and two copies?

Mr. Condon: Original and two copies, yes, sir.

For the year, 1942, there is no dispute between us and the Commission about his computation. For the year 1943, we have a lesser income tax and a lesser excess profits tax. The difference is in the case of the income tax of approximately \$700 and in the case of the excess profits tax a difference of about \$2500.

For the year 1944, the petitioner claims that the income tax is greater than computed by the Commissioner, but that the excess profits tax is \$5,000 less than computed by the Commissioner. These are just round numbers to give you the estimate of the situation.

With respect to declared excess value profits tax, the computation, there is no dispute.

We come down to certain things. In your Honor's decision, that the Commissioner has not taken into consideration in making the computation. For instance, the officer's salaries, is one. Contributions, \$500.31.

The Commissioner has wholly failed to take into consideration in his computation any question of earnings and profits accumulated by the Corporation in the year 1942, and the failure to pay through the invested capital of the petitioner for each of the years '42, '43, '44. The additional capital put in the business, the income of which is held to be income under the decision of the corporation. There was no credit for borrowing invested capital for any of the years. There is a slight adjustment of \$212.76, and another adjustment of \$1.25, which are unnecessary to comment on, but are covered in this affidavit.

Now, another thing: the petitioner had accumulated earnings and profits at the end of 1941 of \$18,351.05. Then, by carrying those along, we get the tax that has been computed on the basis of an invested capital basis.

Now, I was talking to counsel yesterday who is a very competent gentleman. He tells me that the Commissioner's computation is based on average earnings. I want to point out particularly that the tax payer never filed excess profits tax returns for the years in question because under the Petitioner's theory they were a personal holding company. They did file, and the record shows, they filed personal holding company returns.

Now, Petitioner has not made an election as to whether to elect average earnings or invested capital as the basis of the profits, and this comes up only now for the first time. We submit the Petitioner is entitled to—if that is the fact, under your Honor's

decision—and I am not going beyond your decision in any sense—that the computation we submitted with respect to the lesser amount of some \$8,000, be allowed by the Commission.

Mr. Whitley: Your Honor, I would like to make one more statement.

Briefly, we have this situation: We are considering computations required under rule 50 of the Court's Rules. The parties are in agreement as to income and declared value excess profits tax. The only difference between the parties in the computations relates to an excess profits tax for the year '42 and '43.

Mr. Condon: '43 and '44.

Mr. Whitley: '43 and '44.

Mr. Condon: Which automatically, if I may interrupt, affects the income computation.

Mr. Whitley: I take it that the Petitioner is saying now "My excess profits tax should be computed on an invested capital basis." There is no issue like that presented in the Petition. The Court never passed on it, and I want to say that in discussing this matter with the Petitioner's counsel, I think he is in error in saying we computed it on an earned income basis. I do not know what basis it was computed on. I do not know what the Petitioner reported. I do not know whether he reported any basis or not. But here is the one particular thing that is germane to this question: After the Commissioner made the determination and issues were framed and recorded and passed upon, then to come in and at-

tempt to raise any question under rule 50 having to do with an issue not before the Court, is prohibited by the Rules. He may be basing it entirely on an invested capital method; I don't know whether that is the real difference or not, but if it is, it is not permitted under the Rules.

Further, the Court has found nothing with respect to the Commissioner having refused to allow the Petitioner to compute his excess profits income on an income basis or an invested capital basis. That was not before the Court. The Court made just one finding: That the Commissioner was correct in his determination, except that he was wrong in asserting a penalty. That is the only thing here before the Court.

I understand this is a matter of Petitioner proposes to take to the Circuit Court of Appeals, but I say that has no place in this record here about an invested capital method because the Court has not been called upon to decide it. It is not a question before the Court. It can not be raised under Rule 50. The record is silent on such an issue, so far as I am able to determine.

Take the Petition, allegations of error, paragraph 4: "The Commissioner erred in indicating that conferences were held on March 28, April 9, and May 28, 1947, with respect to return of Petitioner, and that any statements were made with respect thereto"—has nothing to do with invested capital.

Secondly, the Commissioner erred in asserting delinquency penalties for the years '43 and '44. "The

Commissioner erred in indicating that the capital stock of Petitioner was owned in equal proportions by John J. Rogers and Louis C. Scharpf, and in disregarding for Federal Income Tax purposes a partnership known as Twin Oaks Builders Supply Company, and transactions between said partnership and Petitioner."

The next assignment of error: "The Commissioner erred in including in the taxable income of the Petitioner, income for the said partnership for the years '42, '43, '44. The Commissioner *error* in disallowing the net operating loss carryover from the year 1941"—

"The Commissioner erred in computing excess profits taxes on the net income of Petitioner for the years '43, and '44, and in asserting deficiencies in income taxes, declared value excess profits taxes, and excess profits taxes for the years '42, '43 and '44 in the amount set out in Exhibit A or in any other amounts."

That is all the allegation of error. Nothing in there was ever mentioned whether the Petitioner was entitled to compute his income on an invested capital method or what method. The Court was not called upon to decide that question and is not called upon to decide now, as I see it. I submit, your Honor, that the computation of the Commissioner is in accordance with the opinion of the Court in full, and there is no grounds for a deviation from that computation as expressed in the opinion of the Court.

I ask that it be approved.

Mr. Condon: If your Honor please, I know that you and counsel for the Government want to assess what you think is the proper and just tax against this Corporation, the Petitioner in this case.

In view of the circumstances you are both familiar with, this Corporation never filed an excess profits tax return. Any computation or entering of judgment against this Corporation at this time, it seems to me, should be computed on a fair and reasonable basis in accordance with the tax laws to determine its true liability in accordance with your decision. There is no statement in your decision that I could find that says: "Such and such is the correct figure." Your Honor determined the issue in controversy which was that the amounts were income to the Corporation, and that the Corporation was liable for the tax. That is what I understand your Honor's decision to be. In that case, it seems to me the true proper corporate tax, in which there is little difference relatively here, is the amount that should be entered, and it seems to me that is the purpose of Rule 50. The Commissioner, if his intention was correct, there would be no reason for us to appear here before you or submit anything. It would be an idle gesture. It is for the purpose of determining what the exact liability in accordance with your decision is; that we are here before you with respect to Rule 50, and under this I submit the Petitioner's submission with respect to that computation is correct.

Mr. Whitley: Now, one more word.

I agree with Petitioner's counsel, there are apparently no reasons to be here, if he will just point out that there is anything in the opinion of the Court that would direct the action he has taken, I would be very happy to consider it. If there is any statement or any inference in the opinion that the Petitioner should compute his excess profits tax income on an invested capital method I would be happy to see it, but I think that the Court's opinion is clearly void of such an inference. It was not before the Court. It can not be considered, and it can not be considered under rule 50. So if there was an error in computing it—I do not know that there is—I do not know what method the taxpayer is really entitled to compute his excess profits income on. I know the Commissioner determined it in the ninety-day letter. Nothing was said about it then. Nothing was said during the trial. It may be that there might be some inference that these individuals have reported from the partnership as their distributive share, and possibly they have overpaid. That has something to do with their individual liability, but that has nothing in the world to do with the question of what the excess profits tax of this Corporation are, which the Court held was a proper entity to be taxed—it has nothing to do with it, and the computation of the Commissioner is strictly in accordance with the opinion.

The Court: Do you wish to say anything further?

Mr. Condon: I have nothing to say further, your

Honor, except that the final words in the decision merely were to enter a judgment under Rule 50, and I assume that is the proper tax liability of this Corporation, and I assume that is according to the submission to be made. Any ordinary taxpayer or business man who computed this liability in accordance with your decision would have done so and in accordance with, the submission we have made.

Mr. Whitley: I will say on that score that Rule 50 is a rule promulgated by the Court for the purpose of making a computation where the Court finds something other than what was determined in a deficiency notice. It says: You are right in one thing, but you are wrong in another, and it is going to call for a different result. That is the purpose of a Rule 50 computation. You do not have that situation here. The Court has not found anything that the Commissioner did was in error, except as to the penalty, and we have omitted that in the computation.

The Court: I will take this motion under consideration and pass upon it after further view of the record.

Mr. Condon: You see, your Honor, the importance of it is that if they ultimately have to pay all this tax, as far as I can see, this is the only time they can raise that issue under any procedure, and I am a practitioner for many years.

The Court: What do you have to say with reference to the suggestion of respondent's counsel that the matter you are talking about is with the Petitioner Corporation?

Mr. Condon: That is developed before us, sir. The only issue we have here is how to compute the excess profits tax of this corporation under your decision, and I submit the way we have computed it is the fair reasonable way that any tax man who reads it would compute it.

The Court: What is counsel's idea?

Mr. Whitley: That statement, stops short. It does not point out what the Court has said that requires him to take that action. There is nothing in the Court's opinion, and he has failed to show it, that says that the Commissioner must compute the excess profits tax on some particular basis. Now, I can not read that from the opinion. I do not think it is in there, and I think it is incumbent upon the Petitioner to point that out right now, because the Court must be guided by what is said under a Rule 50 computation, if it is to consider such a thing.

Mr. Condon: There are ample statements quoted in the affidavit, Your Honor.

The Court: The Court will consider all the papers that have been filed, and the record passed upon.

Mr. Condon: Thank you very much.

(Whereupon, at 12:00 o'clock, noon, hearing in the above-entitled matter was concluded.)

Filed: T.C.U.S. July 12, 1949.

The Tax Court of the United States

Docket No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Denying recognition to a partnership, formed by petitioner's shareholders, which rented petitioner's premises and operated its business, respondent added the partnership profits to petitioner's income for the years 1942, 1943 and 1944, and determined deficiencies in the taxes and penalties. In its Memorandum Findings of Fact and Opinion, entered March 23, 1949, this Court sustained the determination in respect of the deficiencies, and directed entry of decision under Rule 50. In a computation filed May 12, 1949, respondent arrived at deficiencies by the same method followed in his determination, and in so doing computed excess profits tax credits for 1943 and 1944 by reference to invested capital, which he did not change in amount because of this Court's decision.

In a computation filed May 16, 1949, petitioner computes the excess profits tax credit by reference to amounts of invested capital increased to reflect the amounts credited to the partner-stockholders on

the partnership books and reduced by the portion of partnership profits paid to the partner-stockholders as salaries. Although petitioner assigned no error in the alternative, attacking the computation of deficiencies made by respondent under the view that the partnership was not recognizable, petitioner now argues that under the Court's holding the amounts credited to partners and several minor items should be deemed accumulated earnings or loans which increased invested capital and hence the base for computing the excess profits tax credit.

We are not impressed by the argument that profits credited to the individuals who were petitioner's stockholders have the character of accumulated earnings of the corporation under a holding denying recognition to the partnership. But as no issue was raised in the pleadings as to the computation of taxes under respondent's determination that the partnership should not be recognized, none may be now raised and decided under Rule 50. Accordingly it is:

Ordered and Decided: That there are the following deficiencies in tax:

Year	Income Tax	Declared Value Excess Profits Tax	Excess Profits Tax
1942.....	\$1,394.61	\$ 373.11	\$.....
1943.....	3,120.38	3,778.43	11,311.08
1944.....	4,532.68	6,565.25	24,562.88

[Seal] /s/ LUTHER A. JOHNSON,
Judge.

Entered July 18, 1949.

Served July 18, 1949.

[Title of Tax Court and Cause.]

ORDER FIXING AMOUNT OF BOND

Upon application of counsel for the above-named petitioner to fix the amount of the bond on appeal to the United States Court of Appeals for the Ninth Circuit at \$13,791.88, with "No objection" endorsed thereon by counsel for the respondent, it is

Ordered that the said bond be and the same hereby is fixed in the amount of \$14,000.00.

/s/ LUTHER A. JOHNSON,
Judge.

Dated: Washington, D. C., August 30, 1949.

EMT/mbw

Served August 31, 1949.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES IN DOCKET NO. 16845

Now comes the above-named Petitioner and applies for review of the decision of The Tax Court of The United States in the above-entitled cause, by United States Court of Appeals for the Ninth Circuit, which said decision was entered on July 18, 1949, pursuant to the determination of said Court set forth in Memorandum Findings of Fact and Opinion (Honorable Luther A. Johnson, Judge),

entered on March 23, 1949, and by which the Court ordered and decided that there are deficiencies in income taxes, declared value excess profits taxes, and excess profits taxes, assessable against the above-named Petitioner as follows:

Year	Income Tax	Declared Value	Excess
		Excess Profits Tax	Profits Tax
1942.....	\$1,394.61	\$ 373.11	\$.....
1943.....	3,120.38	3,778.43	11,311.08
1944.....	4,532.68	6,565.25	24,562.88

The nature of the controversy is as follows: Petitioner above-named seeks reversal of the decision, entered as aforesaid, which sustained the determination of the Commissioner of Internal Revenue, Respondent above-named, as set forth in the 90-day letter of deficiency issued by said Respondent and dated October 3, 1947. Said deficiencies in taxes were computed by the disallowance of net operating loss deductions claimed by Petitioner above-named, in amount of \$904.83 for the year 1942 and in amount of \$248.55 for the year 1943, and by the inclusion in income of Petitioner above-named for each of the years hereinafter stated income realized by Twin Oaks Builders Supply Company, a partnership, in amounts and in years as follows:

Year	Ordinary Income	Long-Term
		Capital Gain
1942.....	\$ 4,703.66	\$621.63
1943.....	28,886.52	
1944.....	52,302.35	116.67

The income realized by Twin Oaks Builders Supply Company, a partnership, in amount and in each

year as hereinbefore set forth, was reported on separate individual income tax returns filed for each of said years by the members of said partnership. Petitioner prays for review and reversal of the decision of the Tax Court entered as aforesaid upon the grounds and for the reason that said decision is not supported by substantial or any evidence in the record and is not in accordance with law, particularly, in that said net operating loss deductions were properly claimed for the years 1942 and 1943, and said items of income realized by Twin Oaks Builders Supply Company, a partnership, and each of them, are properly taxable to the members of said partnership and not to Petitioner above-named.

Petitioner applies for review of said decision by United States Court of Appeals for the Ninth Circuit. Said Court has venue to review said decision for the reason that in said Circuit is located the office of the Collector of Internal Revenue (The Office of the Collector of Internal Revenue for the District of Oregon at Portland, Oregon) to which was made return of each and all of the items of income in respect to which the asserted tax deficiencies arise.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,
Counsel for Petitioner.

State of Oregon,
County of Multnomah—ss.

I, Ralph R. Bailey, being first duly sworn, depose and say:

That I am one of the attorneys of record for Twin Oaks Company, Petitioner on review in the within entitled cause, and that I reside and have my office in the City of Portland, County of Multnomah, State of Oregon; that on the 14th day of September, 1949, I duly served the foregoing Petition for Review of the decision of the Tax Court of the United States, by United States Court of Appeals for the Ninth Circuit, by mail, by attaching a true copy thereof, duly certified by me to be such, to the Notice of the Filing of said Petition for Review and by placing the original of said Notice of Filing of Petition for Review, with said copy of the Petition for Review attached thereto, in an envelope securely sealed and plainly addressed to Honorable Charles Eliphant, Esq., Chief Counsel, Bureau of Internal Revenue, Treasury Department, Washington, D. C., and depositing same, with the postage fully prepaid thereon, in one of the regular public mail receiving receptacles of the United States Post Office in said Portland, Oregon; that then and ever since, said Honorable Charles Oliphant was and is the attorney of record in said cause for the Commissioner of Internal Revenue, Respondent therein, and that he maintains his office at the address shown on said envelope as aforesaid, and same was and is his cor-

rect post office address, at which he regularly receives his mail in the usual course of business; that on and ever since the date of such service there was and is direct and regular communication by United States mail between the city named in said address and said Portland, Oregon.

/s/ RALPH R. BAILEY.

Subscribed and sworn to before me this 14th day of September, 1949.

[Seal] /s/ CLIFFORD N. NELSON,
Notary Public for Oregon.

My Commission Expires March 31, 1952.

Received and Filed, T. C. U. S., September 16, 1949.

[Title of Tax Court and Cause.]

NOTICE OF PETITION FOR REVIEW

To United States Court of Appeals
for The Ninth Circuit

To The Commissioner of Internal Revenue, the Respondent above-named, and Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Attorney of Record for Respondent.

Notice is hereby given of the filing by Twin Oaks Company, Petitioner above-named, of its petition for review by United States Court of Appeals For The Ninth Circuit of the decision of The Tax Court of The United States entered in the above-entitled cause on July 18, 1949. A copy of said petition is

attached hereto. Said petition is filed, and this notice given, pursuant to Sections 1141 and 1142, Internal Revenue Code (26 U. S. C. A. Sections 1141 and 1142), and Rule 30 of the United States Court of Appeals for the Ninth Circuit.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,

Counsel For Petitioner.

Service of a copy of the foregoing notice, together with a copy of the petition for review is hereby acknowledged this 19th day of September, 1949.

/s/ CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal Revenue, Attorney for Respondent.

Filed T. C. U. S. September 21, 1949.

In the United States Court of Appeals
For The Ninth Circuit

No. 16845

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS

Now comes the Petitioner on review in the above-entitled proceedings and hereby designates the following points on which it intends to rely on review

by United States Court of Appeals For The Ninth Circuit of a decision of The Tax Court:

1. The Tax Court erred in ordering and deciding that there are deficiencies in income taxes, declared value excess profits taxes, and excess profits taxes, on returns filed by Petitioner on review for the years 1942, 1943 and 1944 as follows:

Year	Income Tax	Declared Value	Excess
		Excess Profits Tax	Profits Tax
1942.....	\$1,394.61	\$ 373.11	\$.....
1943.....	3,120.38	3,778.43	11,311.08
1944.....	4,532.68	6,565.25	24,562.88

2. The Tax Court erred in holding and deciding that income realized by Twin Oaks Builders Supply Company, a partnership, in the years 1942, 1943 and 1944, is taxable to the Petitioner on review, and in holding and deciding that the income realized by the partnership as aforesaid is subject to the taxes imposed on income realized by corporations in and for said years as follows: normal tax imposed by Section 13, Internal Revenue Code (26 U. S. C. A., Section 13); surtax imposed by Section 15, Internal Revenue Code (26 U. S. C. A., Section 15); declared value excess profits tax imposed by Section 600, Internal Revenue Code (26 U. S. C. A., Section 600); and excess profits tax imposed by Section 710, Internal Revenue Code (26 U. S. C. A., Section 710).

3. The Tax Court erred in holding and deciding that Twin Oaks Builders Supply Company, a partnership, was not during the years 1942, 1943 or 1944

a bona fide partnership recognizable for Federal income tax purposes, and in holding and deciding that the only real purpose which motivated the formation of the partnership was to achieve a re-allocation of income among family groups so as to reduce income tax liability.

4. The Tax Court erred in holding and deciding that the transfer of the business, and assets thereof, by Petitioner on review to Twin Oaks Builders Supply Company, a partnership, on January 2, 1941 was without substance, and in holding and deciding that the ownership of said business and assets by the partnership in 1942, 1943 and 1944 could not be recognized for Federal income tax purposes.

5. The Tax Court erred in holding and deciding that the leasing of the real property by Petitioner on review to Twin Oaks Builders Supply Company, a partnership, on January 2, 1941, was without substance, and in holding and deciding that the rights of the partnership in said real property under the lease could not be recognized for Federal income tax purposes.

6. The Tax Court erred in holding and deciding that John J. Rogers and Louis C. Scharpf conducted the business, after January 1941, with the same assets and in the same manner as said business was conducted prior to January, 1941.

7. The Tax Court erred in holding and deciding that no additional funds were paid into the business

as operating capital thereof at the time that said business was transferred by Petitioner on review to Twin Oaks Builders Supply Company, a partnership.

8. The Tax Court erred in holding and deciding that no assets were removed from the ownership of Petitioner on review by the transfer of said assets to Twin Oaks Builders Supply Company, a partnership, and in holding and deciding that there was no change in policy in management of the business, or in the managing personnel of the business, resulting from the transfer of the business by Petitioner on review to Twin Oaks Builders Supply Company, a partnership.

9. The Tax Court erred in holding and deciding that the contributions of the partners to the capital of Twin Oaks Builders Supply Company, a partnership, were made, and the sale price of the assets transferred by Petitioner on review to said partnership was paid, in conformity with a scheme which had no substantive effect whatever on the business.

10. The Tax Court erred in holding and deciding that Twin Oaks Builders Supply Company, a partnership, contributed absolutely nothing either in services or capital to the production of the income realized by said partnership in 1942, 1943 and 1944, and in holding and deciding that the only function and purpose of the partnership in said years was to siphon off the greater portion of the earnings of the business.

11. The Tax Court erred in holding and deciding that the business of Petitioner on review, prior to January 2, 1941, was unitary in character and not susceptible of any logical division.

12. The Tax Court erred in holding and deciding that the oral testimony of John J. Rogers and Louis C. Scharpf, with respect to their reasons for transferring the business from Petitioner on review to Twin Oaks Builders Supply Company, a partnership, affirmatively supports the view that the purpose of the partnership was to achieve a reallocation of income among family groups.

13. The Tax Court erred in making a determination as to the status for Federal income tax purposes of Twin Oaks Builders Supply Company, a partnership, when the status of said partnership, for the purposes of Federal income tax, was not an issue in the case, and, particularly, The Tax Court erred in holding and deciding that income realized by said partnership is taxable to Petitioner on review, because of the determination of the Court that said partnership is not recognizable for tax purposes, when the status of said partnership for Federal income tax purposes was not an issue in the case and the evidence with respect to said matter was not presented at trial.

14. The Tax Court erred in entering as the decision of the Court the computations of excess profits taxes for the years 1942, 1943 and 1944 submitted to the Court by the Respondent, Commis-

sioner of Internal Revenue, under Rule 50 of The Tax Court, and in refusing to enter as the decision of the Court the computations of excess profits taxes for the years 1942, 1943 and 1944 submitted to the Court by Petitioner on review under Rule 50 of The Tax Court.

15. The Tax Court erred in holding and deciding that the Petitioner on review may not, upon the determination by the Court of the tax deficiencies under Rule 50 of said Court, raise an issue as to the tax computations submitted by the Respondent, Commissioner of Internal Revenue, pursuant to said Rule 50, because such issue was not raised by the pleadings filed by the Petitioner on review.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,

Counsel for Petitioner.

Affidavit of service by mail attached.

[Endorsed]: Filed T. C. U. S., September 16, 1949.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents 1 to 41, inclusive, constitute and are all of the original papers and proceedings on file in my office as the original and complete record in

the proceeding before The Tax Court of the United States entitled: "Twin Oaks Company, Petitioner, v. Commissioner of Internal Revenue, Respondent," Docket Number 16845, and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 4th day of October, 1949.

[Seal]

VICTOR S. MERSCH,

Clerk.

[Endorsed]: No. 12386. United States Court of Appeals for the Ninth Circuit. Twin Oaks Company, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed October 24, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For The Ninth Circuit

No. 12386

TWIN OAKS COMPANY,
Petitioner,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS TO BE RELIED
ON BY PETITIONER ON REVIEW

Now comes the Petitioner on review in the above-entitled proceedings and hereby designates the following points on which it intends to rely on review by United States Court of Appeals For The Ninth Circuit of a decision of The Tax Court:

1. The Tax Court erred in ordering and deciding that there are deficiencies in income taxes, declared value excess profits taxes, and excess profits taxes, on returns filed by Petitioner on review for the years 1942, 1943 and 1944 as follows:

Year	Income Tax	Declared Value	Excess
		Excess Profits Tax	Profits Tax
1942.....	\$1,394.61	\$ 373.11	\$.....
1943.....	3,120.38	3,778.43	11,311.08
1944.....	4,532.68	6,565.25	24,562.88

2. The Tax Court erred in holding and deciding that income realized by Twin Oaks Builders Supply Company, a partnership, in the years 1942, 1943

and 1944, is taxable to the Petitioner on review, and in holding and deciding that the income realized by the partnership as aforesaid is subject to the taxes imposed on income realized by corporations in and for said years as follows: normal tax imposed by Section 13, Internal Revenue Code (26 U. S. C. A., Section 13); surtax imposed by Section 15, Internal Revenue Code (26 U. S. C. A., Section 15); declared value excess profits tax imposed by Section 600, Internal Revenue Code (26 U. S. C. A., Section 600); and excess profits tax imposed by Section 710, Internal Revenue Code (26 U. S. C. A., Section 710).

3. The Tax Court erred in holding and deciding that Twin Oaks Builders Supply Company, a partnership, was not during the years 1942, 1943 or 1944 a bona fide partnership recognizable for Federal income tax purposes, and in holding and deciding that the only real purpose which motivated the formation of the partnership was to achieve a reallocation of income among family groups so as to reduce income tax liability.

4. The Tax Court erred in holding and deciding that the transfer of the business, and assets thereof, by Petitioner on review to Twin Oaks Builders Supply Company, a partnership, on January 2, 1941 was without substance, and in holding and deciding that the ownership of said business and assets by the partnership in 1942, 1943 and 1944 could not be recognized for Federal income tax purposes.

5. The Tax Court erred in holding and deciding that the leasing of the real property by Petitioner on review to Twin Oaks Builders Supply Company, a partnership, on January 2, 1941, was without substance, and in holding and deciding that the rights of the partnership in said real property under the lease could not be recognized for Federal income tax purposes.

6. The Tax Court erred in holding and deciding that John J. Rogers and Louis C. Scharpf conducted the business, after January, 1941, with the same assets and in the same manner as said business was conducted prior to January, 1941.

7. The Tax Court erred in holding and deciding that no additional funds were paid into the business as operating capital thereof at the time that said business was transferred by Petitioner on review to Twin Oaks Builders Supply Company, a partnership.

8. The Tax Court erred in holding and deciding that no assets were removed from the ownership of Petitioner on review by the transfer of said assets to Twin Oaks Building Supply Company, a partnership, and in holding and deciding that there was no change in policy in management of the business, or in the managing personnel of the business, resulting from the transfer of the business by Petitioner on review to Twin Oaks Builders Supply Company, a partnership.

9. The Tax Court erred in holding and deciding that the contributions of the partners to the capital of Twin Oaks Builders Supply Company, a partnership, were made, and the sale price of the assets transferred by Petitioner on review to said partnership was paid, in conformity with a scheme which had no substantive effect whatever on the business.

10. The Tax Court erred in holding and deciding that Twin Oaks Builders Supply Company, a partnership, contributed absolutely nothing either in services or capital to the production of the income realized by said partnership in 1942, 1943 and 1944, and in holding and deciding that the only function and purpose of the partnership in said years was to siphon off the greater portion of the earnings of the business.

11. The Tax Court erred in holding and deciding that the business of Petitioner on review, prior to January 2, 1941, was unitary in character and not susceptible of any logical division.

12. The Tax Court erred in holding and deciding that the oral testimony of John J. Rogers and Louis C. Scharpf, with respect to their reasons for transferring the business from Petitioner on review to Twin Oaks Builders Supply Company, a partnership, affirmatively supports the view that the purpose of the partnership was to achieve a reallocation of income among family groups.

13. The Tax Court erred in making a determination as to the status for Federal income tax purposes of Twin Oaks Builders Supply Company, a partnership, when the status of said partnership, for the purposes of Federal income tax, was not an issue in the case, and, particularly, The Tax Court erred in holding and deciding that income realized by said partnership is taxable to Petitioner on review, because of the determination of the Court that said partnership is not recognizable for tax purposes, when the status of said partnership for Federal income tax purposes was not an issue in the case and the evidence with respect to said matter was not presented at trial.

14. The Tax Court erred in entering as the decision of the Court the computations of excess profits taxes for the years 1942, 1943 and 1944 submitted to the Court by the Respondent, Commissioner of Internal Revenue, under Rule 50 of The Tax Court, and in refusing to enter as the decision of the Court the computations of excess profits taxes for the years 1942, 1943 and 1944 submitted to the Court by Petitioner on review under Rule 50 of The Tax Court.

15. The Tax Court erred in holding and deciding that the Petitioner on review may not, upon the determination by the Court of the tax deficiencies under Rule 50 of said Court, raise an issue as to the tax computations submitted by the Respondent, Commissioner of Internal Revenue, pursuant to said

Rule 50, because such issue was not raised by the pleadings filed by the Petitioner on review.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,

Attorneys for Petitioner
on Review.

Affidavit of service by mail attached.

[Endorsed]: Filed C. C. A. October 26, 1949.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED

To the Clerk of the United States Court of Appeals for the Ninth Circuit:

In connection with the Petition for Review of the decision of The Tax Court of the United States entered herein on July 18, 1949, by the United States Court of Appeals for the Ninth Circuit, it is respectfully designated that there be printed under your supervision the entire record in the above-entitled cause as certified and transmitted by the Clerk of the Tax Court of the United States, except as following entries as appearing on the Docket of the Tax Court of the United States:

Motion for and Order Granting Extension of Time to File Petitioner's Brief, Docket No. 15.

Petitioner's Opening Brief, Docket No. 16.

Motion for and Order Granting Enlargement of Time to File Brief for Respondent, Docket No. 17.

Respondent's Motion for and Order Granting Extension to File Brief, Docket No. 18.

Respondent's Motion for and Order Granting Leave to File Brief, Docket No. 19.

Reply Brief for Respondent, Docket No. 20.

Motion for Order and Order Extending Time to File Petitioner's Reply Brief, Docket No. 21.

Petitioner's Reply Brief, Docket No. 22.

Petitioner on Review has made application to this Court to be relieved from printing or reproducing Petitioner's original Exhibits 1 through 44, appearing as Docket Entry No. 9 on the Docket of the Tax Court of the United States, and Respondent's original Exhibits A, B, C, E, F, G, K through Z, AA through GG, appearing as Docket Entry No. 10 on the Docket of the Tax Court of the United States. In the event that said application is granted by the Court, then it is respectfully requested that said original Exhibits not be included in the record to be printed as herein designated.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,

Attorneys for Petitioner on
Review.

Affidavit of service by mail attached.

[Endorsed]: Filed C.C.A. October 26, 1949.

In the United States Court of Appeals
for the Ninth Circuit

No. 12386

TWIN OAKS COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPLICATION FOR RELIEF FROM PRINT-
ING OR REPRODUCING EXHIBITS

Comes now the Petitioner on Review in the above-entitled proceedings by its Counsel of Record, and

Averring that the original Exhibits admitted in evidence at trial in said proceeding before the Tax Court of the United States, consist of Petitioner's Exhibits 1 to 44, inclusive, and Respondent's Exhibits A, B, C, E, G, and K to Z inclusive, and AA to GG inclusive; that said Exhibits consist mainly of financial statements, schedules of arithmetical computations, income tax returns and legal documents; and that most of said Exhibits are of such a nature as to make the same not of printable type or of such a nature as to make the cost of printing the same substantial;

Makes application to the Court for an Order directing that, on the basis of the facts hereinbefore averred and the affidavit attached hereto and made part hereof, the original Exhibits admitted in evi-

dence at trial of said proceedings before the Tax Court of the United States, and certified and transmitted by the Clerk of the Tax Court of the United States to the Clerk of this Court, need not be printed in the record on review herein, and directing that said Exhibits shall be considered by this Court, and may be referred to by Counsel in their respective briefs and on oral argument and reproduced in whole or part in an appendix to their respective briefs, with the same force and effect as if said Exhibits were included in the printed record on review.

/s/ CARL E. DAVIDSON,

/s/ RALPH R. BAILEY,

Attorneys for Petitioner on
Review.

So Ordered:

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

/s/ WALTER L. POPE,

U. S. Circuit Judges.

State of Oregon,

County of Multnomah—ss.

I, Ralph R. Bailey, being first duly sworn, depose and say that I am one of the Attorneys of Record for Petitioner on Review in the within cause; that the original Exhibits admitted in evidence in said cause before the Tax Court of the United States consist of Petitioner's Exhibits 1 to 44, inclusive, and Respondent's Exhibits A, B, C, E, F, G, and K to Z

inclusive, and AA to GG, inclusive; that said Exhibits consist mainly of financial statements, schedules of arithmetical computations, income tax returns and legal documents; that most of said Exhibits are of such a nature as to make the same not of a printable type or of such a nature as to make the cost of printing the same substantial.

/s/ RALPH R. BAILEY.

Subscribed and sworn to before me this 24th day of October, 1949.

[Seal] /s/ MARION HUGGINS,
Notary Public for Oregon.

My Commission Expires March 13, 1951.

Affidavit of service by mail attached.

[Endorsed]: Filed October 26, 1949.